Supreme Court, U.S.
FILED
AUG 13 2007
OFFICE OF THE CLERK

No. 07-196

IN THE

SUPREME COURT OF

THE UNITED STATES

DARUS ZEHRBACH
Petitioner

V.

UNITED STATES OF AMERICA
Respondent

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Introduction:

The case against Petitioner was a highly disputed one where the victims and at least nine of the government witnesses were involved in or owners of a competing company making a product that was nearly identical to and based on that of Petitioner. Further, those victims' and or witnesses' Federal civil action against Petitioner had been dismissed. They were being sued by Petitioner for in excess of $20 Million for theft of trade secret and proprietary designs, theft of the products claimed by the government as not delivered, and bribes or payoffs to DOJ employees to cause Petitioner problems. Petitioner had already won civil actions against some of the government witnesses and received damage payments. Against this backdrop, and while the civil litigation by Petitioner against the victims and witnesses was on going, the government stepped into the fight to take sides with the civil suit defendants, and indicted and prosecuted Petitioner.

Instances of prosecutor misconduct starting immediately in the Grand Jury phase as subpoenaed witnesses who were crucial and key defense witnesses went to the Judge and made complaints of prosecutor misconduct of coercion, assault, and evidence destruction. Any key witness who had complained of prosecutor misconduct was barred from testifying at trial by the trial judge denying the defense its most key witnesses. The misconduct of prosecutor Zelda Wesley and the Postal Inspector Steven Randolph continued unabated throughout the entire prosecution, sentencing, and even into the appeals process with fabrication of evidence and or false swearing in the appeal documents.

The major issue of the Petitioner's 28 at 2255 Petition was the misconduct of the Assistant US Attorney Zelda Wesley and the US Postal Inspector Steven Randolph. This issue had been touched on to some degree in the Direct Appeal of

Petitioner where it was documented that prosecutor Wesley acted as if she was a witness at trial and lied to the judge and jury presenting them with "evidence" that she fabricated herself and knew to be fraudulent resulting in her admonishment on the record. Further, the Appeals Court in Oral arguments admonished the prosecutor stating that she "took the law into your own hands" in a win at all costs and by any method or means campaign. The 28 at 2255 Petition subsequently fully developed the misconduct issue that had only been touched upon in the Direct Appeal. Yet despite the attachment of sworn affidavits from witnesses and other indisputable documented proof from numerous sources, not one of the instances or issues of misconduct was ever commented on or ruled upon by any Judge in the entire progression of the case to and through the Fourth Circuit Court of Appeals.

In an effort to document beyond any doubt that the prosecutor had engaged in a blatant and broad campaign of Misconduct Petitioner availed himself of the fact that a 28 at 2255 Petition is also a civil action and filed Motions for Partial Summary Judgment and to Expand the Record that documented the misconduct beyond anything required for a 28 at 2255 action. The Government never objected to or otherwise answered any Motion that Petitioner ever filed. Despite the total lack of objection, the Courts ignored every one of the Motions and refused to comment upon them or rule for Petitioner in violation of the Rules of procedure.

The Government in its Answer to the 2255, refused to object or respond to a number of the issues, including misconduct, leaving them unopposed or refused to answer as required by the Rules. Subsequently the Magistrate in his recommendations ignored the unopposed issues, as did the District Court, as did the Appeals Court. All refused to rule or comment upon those issues in turn and refused to rule on

Petitioner's request for judgment under the rules of Civil Procedure given the lack of opposition.

Questions

(A) Did the Fourth Circuit Appeals Court and the District Judges fail in their duty, abuse their discretion, and hide from the truth of the misconduct of the Assistant US Attorney Zelda Wesley by refusing to comment or rule upon such misconduct issues (even when part of the misconduct was admitted -stated by the Court as she "took the law into your own hands" in Oral Arguments or when not denied by the prosecutor) such that their failure to act denied Petitioner his constitutional rights?

(B) Did the Fourth Circuit Appeals Court refuse to follow the existing Supreme Court Opinion in Dye v Hofbaurer, Case No. 04-8384 which stated that the courts must look at the substance of a defendant's pleadings and not merely the denial of the lower court and rule upon the prosecutorial misconduct and other issues specifically presented to the court?

(C) Did the numerous acts of prosecutorial misconduct documented by the affidavits of witnesses and other clear evidence of acts including but not limited to: forgery of evidence, solicitation of perjury, coercion of witnesses, fabrication of evidence, destruction and or concealment of evidence, indictment tampering, intercepting attorney mail, constitute sufficient evidence as to require the reversal of Petitioner's conviction?

(D) Did the Court err and fail to follow the law as per Rule 5 of 2255 and the body of case law contained in the Advisory Committee Notes that if the Petition "—raise disputed issues of fact a hearing must be held" and improperly denied Petitioner a hearing. Further, did the

Court fail to respond to Petitioner's evidence that the government failed to"-- respond to the allegations of the motion" as required under Rule 5(a) of 2255?

(E) Did the Appeals Court err by failing to follow the Rules of Procedure and or to consider the Issue that the District Court had refused to follow the Rules of Procedure governing Motion Practice by:

-Failing to Grant unopposed or unanswered Motions where only the evidence of Petitioner was submitted to the Court.

-Failing to hold hearings on the unopposed or unanswered Motions

-Failing to comment or rule upon the unopposed or unanswered Motions.

(F) Did the Fourth Circuit Appeals Court err by denying Petitioner's 2255 action justifying the denial using a Magistrate's recommendation and a district judge's order which both failed to rule upon and were silent to issues that the government, in its response to the 2255, refused to answer at all or did not oppose in accordance with CPRules 8(b) and (d) and or to Rule 5(a) of the rules governing Section 2255 Proceedings?

Given the lack of opposition and or refusal to answer the issue by the government, should the relief requested by Petitioner for the issues have been granted as requested by Petitioner pursuant to the rules of procedure?

(G) Did the Appeals Court fail in its duty, irrespective of Petitioner's Constitutional Rights violation claims, to police the court and to act upon the evidence of misconduct presented to it and to issue sanctions and or order a criminal investigation of the misconduct of the prosecutor and investigating officer?

(H) Did the Appeal Court err by failing to consider the refusal of the District Court and Magistrate to allow Petitioner to Expand the Record with documents that evidenced the misconduct of the prosecutor and or fraudulent information used to convict per Petitioner's request under Rule 7(a) of 28 at 2255 denied Petitioner a fair hearing of the issues?

PARTIES TO THE PROCEEDING WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

The Fourth Circuit Court of Appeals (Richmond, Va.)
Judges Niemeyer, King, and Duncan

Judge Craig Broadwater, District Judge (Martinsburg, WV)

Judge Ireene Keeley, District Judge (Clarksburg, WV)

Magistrate Judge John Kaull (Clarksburg, WV)

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ORDER by District Judge Broadwater ADOPTING REPORT AND RECOMMENDATION of the Magistrate, dated 10/20/06

OPINION/REPORT AND RECOMMENDATION of the Magistrate, dated 3/23/06

Basis for Supreme Court Jurisdiction

This Appeal is from an Order dismissing the 28 USC at 2255 Motion of Petitioner (entered 2/26/07) and of the subsequent Denial of a Petition for Rehearing En banc (filed 5/15/07) issued by the US Court of Appeals for the Fourth Circuit. The 2255 Motion had been originally filed in the US District Court for the Northern District of West Virginia (Clarksburg) and arose from a action in that Court pursuant to 18 USC 371 AND 1341. This Court therefore has jurisdiction pursuant to 28 USC 1254 (1) to review on certiorari the decision of a Federal Court of Appeals.

Constitutional Issues Involved in the Case

Constitution of the United States, Amendment X and XIV, Due Process

STATEMENT OF THE CASE

The case against Petitioner was a highly disputed one where the victims and at least nine of the government witnesses were involved in or owners of a competing company making a product that was nearly identical to and based on that of Petitioner. Further, those victims' and or witnesses' Federal civil action against Petitioner had been dismissed. They were being sued by Petitioner for in excess of $20 Million for theft of trade secret and proprietary designs, theft of the products claimed by the government as not delivered, and bribes or payoffs to DOJ employees to cause Petitioner problems. Petitioner had already won civil actions against some of the government witnesses and received damage payments. Against this backdrop, and while the civil litigation by Petitioner against the victims and witnesses was on going, the government stepped into the fight to take sides with the civil suit defendants, and indicted and prosecuted Petitioner.

Instances of prosecutor misconduct starting immediately in the Grand Jury phase as subpoenaed witnesses who were crucial and key defense witnesses went to the Judge and made complaints of prosecutor misconduct of coercion, assault, and evidence destruction. Any key witness who had complained of prosecutor misconduct was barred from testifying at trial by the trial judge denying the defense its most key witnesses. The trial judge would also not let into evidence that which had been gained from the civil cases which Petitioner had won nor that gained from the civil case of the victims that had been thrown out of Federal Court. These cases demonstrated that the purpose of the victims criminal complaint was to defend a civil case and where that complaint had been filed within two weeks of notice of a pending lawsuit from Petitioner

The misconduct of prosecutor Zelda Wesley and the Postal Inspector Steven Randolph continued unabated throughout

the entire prosecution, sentencing, and even into the appeals process with fabrication of evidence and or false swearing in the appeal documents

During the trial the trial judge admonished the prosecutor for testifying as a witness and for presenting fabricated and fraudulent evidence to the jury. Petitioner filled a direct appeal that among the issues raised the trial misconduct. Subsequently, during sentencing, the issues of the fraudulent nature of the claims were raised but the trial and sentencing judge Ireene Keeley ruled absolutely and only for the maximum and or whatever the prosecutor asked for with disregard to the evidence.

Subsequently, Petitioner filed a 28 at 2255 action that a fully developed the prosecutor misconduct and issues of bribery of DOJ employees by the victims and other after trial discovered evidence. This 2255 was ruled upon by Judge Broadwater (Martinsburg) (after Judge Keeley, the original trial judge, of Clarksburg recussed herself after complaints of her basing decisions upon non existent documents and quotes) In his Order dated October, 20th, 2006 Judge Broadwater adopted the report and recommendation of the Magistrate Judge recommending that the Petition be denied. In adopting the Magistrate's report Judge Broadwater simply adopted the report and clearly did not analyze the report and the Objections thereto as he did not rule upon three issues/grounds stated in the 2255 motion (which the magistrate ignored also) or address the issues which the government did not oppose or answer as required by the rules. The Appeals Court then in turn simply adopted the flawed decision of Broadwater and again refused to review the issues despite their previous recognition of the misconduct of the Prosecutor Wesley and the clear presentation of the issues.

A review of the issues that Petitioner raised confirms that the issues are substantial and include but are not limited to a number of instances of prosecutorial misconduct, forgery and fabrication of documents, evidence tampering, coercion of witnesses, interception of attorney mail, destruction of documents by the government, concealment of evidence, and payoffs to justice department employees by victims. Petitioner made a substantial showing of the denial of a constitutional right.

In an attempt to force the courts to address the misconduct, Petitioner presented the evidence in motions of partial summary judgment to the lower court included sworn affidavits of the prosecutor misconduct by witnesses in the case, and documents from Federal Agencies such as the FAA not available at trial time. Further, Petitioner submitted additional evidence in Motions to Expand the Record. There could have been no doubt by any unbiased reader that the trial was a sham with a conviction obtained by prosecutor misconduct that arose to criminal misconduct. The issues cannot be mere inventions of Petitioner or frivolous as they were supported by the sworn affidavits of a number of witnesses and documents. In the case of the bribes or payoffs by the victims to federal employees, the evidence came from US Postal Inspector reports.

The Courts already had a small glimpse of the misconduct of prosecutor Zelda Wesley in the direct appeal where it was documented that the prosecutor acted as if she was a witness at trial and lied to the judge and jury telling them known to be fabricated and fraudulent facts resulting in her admonishment on the record. In oral arguments during the direct appeal one of the appellate judges stated that Ms. Wesley "took the law into your own hands". It was clear to the Court that the prosecutor does willfully engage in misconduct and therefore they had a reason to believe that all

of the misconduct issues were true and therefore should have been fully heard by the Appeals Court. However, instead, the Court refused to comment upon the misconduct, evaded the issues, refused to comment upon the misconduct, and falsely stated that Petitioner had not presented any viable or substantial issues. The Court therefore refused to follow the existing Supreme Court Opinion established in Dye v Hofbaurer, Case No. 04-8384 (October 11, 2005) This Court stated that the courts must look at the substance of a defendant's pleadings and not merely the denial of the lower court. "As the prosecutorial misconduct claim was presented properly, it, and any other federal claims properly presented, should be addressed by the Court of Appeals on remand"

The Appeals Court and the District Court each in turn refused to follow the rules of procedure and to grant the issues that the government did not oppose or answer.

In order for the District and the Appeal Court to evade the misconduct issues the Courts failed and refused to follow the rules and law in regard to a 28 at 2255 and to hold any hearings as required by Rule 5 of 2255 into the disputed issues. Further, the Courts refused to follow the rules for a 2255 and the rules of civil procedure and or (A) Allow the Expansion of the Record (B) Consider the Motions for Partial Summary Judgment (C) Allow Discover to further expose the prosecutor misconduct. The Courts clearly preferred that the prosecutor's misconduct and the misconduct of the victims remain as hidden as possible and to leave stand a sentence based on materially incorrect, unreliable, and untrustworthy information about facts of importance.

Despite all of the reasons discussed above, the Appeals court stated that Petitioner did not made a "substantial showing of

the denial of a constitutional right" and denied all of his requests and refused to issue a certificate of appealability or to hear the appeal en banc.

Petitioner asks that this Supreme Court grant his writ of certiorari to conform the Court of Appeals decisions to existing Supreme Court decisions and authority, to establish the requirements for proper hearing of an Appeal with adherence to the rules, to promote respect for the Courts, and to correct a gross miscarriage of justice that has been inflicted upon Petitioner that if left undisturbed will promote prosecutor misconduct in the courts and the disregard for the Rules and Laws of this land.

Argument

(A) Did the Fourth Circuit Appeals Court and the District Judges fail in their duty, abuse their discretion, and hide from the truth of the misconduct of the Assistant US Attorney Zelda Wesley by refusing to comment or rule upon such misconduct issues (even when part of the misconduct was admitted -stated by the Court as she "took the law into your own hands" in Oral Arguments or when not denied by the prosecutor) such that their failure to act denied Petitioner his constitutional rights.

The 28 at 2255 Motion filed by Petitioner in the District Court along with the Preliminary Informal Brief filed with the Fourth Circuit Court of Appeals indisputably clearly and undeniably raised issues of prosecutor misconduct. These Issues verbatim from the Preliminary Brief were:

ISSUE I: THE PROSECUTOR SOLICITED KNOWN PERJURY AFTER ACTING TO DESTROY OR

CONCEAL EXONNERATING EVIDENCE AND TO COERCE WITNESESSES.

ISSUE 2: THE PROSECUTOR AND POSTAL INSPECTORS CONCEALED OR DESTROYED EXONNERATING DOCUMENTS AND INTERVIEWS AND REPORTS AND THE INTERCEPTION OF ATTORNEY CLIENT MAIL THAT WAS PRIVILEDGED IN NATURE.

ISSUE 3: THE PROSECUTOR MADE IMPROPER STATEMENTS TO THE JURY AND OR JUDGE AS IF SHE WAS A WITNESS THAT SHE KNEW WAS FRAUDULENT STATEMENTS AND DELIBERATE PERJURY. FURTHER, SHE PERSONALLY VOUCHED FOR THE CREDIBILITY OF HER WITNESS.

ISSUE 4: THE PROSECUTOR USED A FORGED OR FABRICATED DOCUMENT AT TRIAL THAT SHE KNEW TO BE FORGED AND WHERE EVIDENCE SUGGESTS THAT SHE FORGED IT HERSELF.

ISSUE 5: TRIAL EXHIBITS WERE TAMPERED WITH SUCH THAT KEY SECTIONS WHICH THE PROSECUTOR WANTED TO MAKE CLAIMS ABOUT WRE REMOVED AND CONCEALED FROM THE JURY.

ISSUE 6: THE PROSECUTOR ENGAGED IN OTHER MISCELLANEOUS MISCONDUCT IN ADDTION TO THOSE NOTED IN ISSUES 1 THROUGH 5 IN ORDER TO DENY ZEHRBACH A FAIR TRIAL.

ISSUE 7: THE GOVERNMENT ILLEGALLY INTERCEPTED PRIVILEGED ATTORNEY CLIENT MAIL. IT ALSO INTERCEPTED AND DESTROYED

OTHER DOCUMENTS FROM CUSTOMERS AND WOULD BE WITNESSES.

ISSUE 10: ZEHRBACH WAS FRAUDULENTLY INDICTED BY ILLEGAL MISCONDUCT IN THE GRAND JURY BY THE PROSECUTOR.

No honest reader of the Motion or Brief can honestly state that the issues of misconduct were not raised based on the mere titles of the issues as repeated above. Under each issue, Petitioner specifically called out the particular documents and or evidence that supported such a statement as an issue. These ranged from the sworn affidavits of witnesses to the documents of Federal Agencies such as the FAA, to trial statements, statements during hearings, and the blunders that revealed evidence fabrication. No honest reader can claim that the issues were unsupported or frivolous.

Compounding the refusal of the Appeals Court to consider the misconduct issues clearly presented to it was the fact that the Appeal Court and the District Court had both made comments as to the misconduct of the prosecutor previously. The district court admonished the prosecutor on the record as to acting as a witness and providing known to be fabricated or false information to the jury. Even before that, Grand Jury witnesses had met with the trial judge to file complaints of assault, coercion, and destruction of documents by the prosecutor. The Appeals Court during Oral Arguments commented on the misconduct such that one of the judges berated the prosecutor and stated that she "took the law into your own hands". Both Courts therefore clearly and indisputably knew that the prosecutor had no problem engaging in such activity and or had a tendency and or habit of engaging in them. They therefore knew what type of person they were dealing with and had every reason to

scrutinize to the fullest every claim and or shard of evidence that indicated prosecutor misconduct. There is no excuse for not having done so. Instead they stated that Petitioner's issues did not constitute a "substantial showing of the denial of a constitutional right." This is the second time that the Appeals Court effectively covered up or refused to react to the prosecutor misconduct as in the Direct Appeal, after having told the prosecutor that she had taken the law into her own hands and berated her for her misconduct in Oral Arguments, the Court failed and refused to make one single comment upon or in regard to the misconduct in the Direct Appeal opinion and denied the appeal.

The only conclusion possible is that the Appeals Court wished to cover up the misconduct and or hide from the truth of it and refuse to properly consider the misconduct issues thereby denying Petitioner his Constitutional Rights.

(B) Did the Fourth Circuit refused to follow the existing Supreme Court Opinion in Dye v Hofbaurer, Case No. 04-8384 which stated that the courts must look at the substance of a defendant's pleadings and not merely the denial of the lower court and rule upon the prosecutorial misconduct and other issues specifically presented to the court.

Petitioner, in his Petition for Rehearing En Banc under MATERIAL LAWS OVERLOOKED IN THE DECISION pointed out to the Appeals Court that they had failed to rule and or even consider issues in accordance with the rulings of this Supreme Court.

The US Supreme Court has indicated in Dye v Hofbaurer, Case No. 04-8384 (October 11, 2005) that the courts must look at the substance of a defendant's pleadings and not merely the denial of the lower court. The Appeals Court has

failed to look at the substance of Petitioner's pleadings as required by the Supreme Court under Dye.

The Dye case and this instant one are exactly the same situation as Dye raised issues regarding prosecutorial misconduct in a post conviction motion. Exactly like Dye, the Appeal Courts acted just like the Fourth Circuit Appeal Court and denied relief, but in the opinion(s) did not make any reference to any of the claimed federal errors in the case and avoided the issues. Just like Dye, in an effort to hide from the truth of prosecutorial misconduct that rose to the level of criminal, this court has seized upon procedural rules or focusing on non raised issues to deny relief.

The Dye case should have indicated to the Fourth Circuit court that courts are no longer free to ignore the merits of a claim simply because they have found some procedural reason to do so. In this instant case, the Fourth Circuit went a step beyond and created the procedural reason by falsely claiming in a sweeping ruling that Petitioner's issues did not constitute a "substantial showing of the denial of a constitutional right" and then resorted to the procedural bar.

This Supreme Court noted in Dye that just as in this case, specific allegations of prosecutorial misconduct were outlined in the Petitioner's brief with more than sufficient particularity. Petitioner submits to this Court that the eight (8) specific references to prosecutorial misconduct as stated in the Issues listed under Question A in this Motion and listed above more than meet the requirements of Dye. This Supreme Court stated in Dye that: "As the prosecutorial misconduct claim was presented properly, it, and any other federal claims properly presented, should be addressed by the Court of Appeals on remand"

(C) Did the numerous acts of prosecutorial misconduct documented by the affidavits of witnesses and other clear evidence and or the brief and motions of Petitioner evidencing acts including but not limited to forgery of evidence, solicitation of perjury, coercion of witnesses, fabrication of evidence, destruction and or concealment of evidence, indictment tampering, intercepting attorney mail constituted sufficient evidence as to require the reversal of Petitioner's conviction.

The main question then of exceptional importance is just how much criminal misconduct must this court see and in what form must it be in order for the misconduct to become so great as to deny a prisoner/Petitioner a fair trial and or his constitutional rights. Did the Cumulative effect of the misconduct deny Petitioner his constitutional rights and a fair trial?

The misconduct in this case is not frivolous and is highly documented by the sworn affidavits of witnesses, letters and emails from witnesses, exhibits from the trial, transcripts from hearings, transcripts from the trial, and documents obtained after the trial. The bribe or payoff money paid by the victims to Dept of Justice employees was freely admitted and contained in a Postal Inspector's report. The prosecutor knew of the payments and not only concealed it but also criminally lied to the district judge about it at sentencing. No one knows how far the payoffs reached

Petitioner asserts that the misconduct was so pervasive and intruded into so many aspects of the trial interfering with the Grand Jury Hearings, the Pretrial Hearings, the Trial itself, Sentencing, and even into the Appeal such that it would be impossible for Petitioner to have had fair treatment of his rights under the Due Process clauses of the Fifth and Fourteenth Amendments of the Constitution. Not one part of

the process of the prosecution of Petitioner was without at least one and generally many, instances of misconduct.

Further, it is not only the number of instances of misconduct, and the fact that they were involved in every part of the prosecution, but that they ranged across such a wide style of misconduct ranging from the documented perjury and or acting as a witness that the prosecutor was berated for at trial to forgery of evidence, solicitation of perjury, coercion of witnesses, fabrication of evidence, destruction and or concealment of evidence, indictment tampering, intercepting attorney mail, and tampering with the grand jury indictment. It is therefore impossible that given the pervasiveness of the misconduct and the nature of the misconduct that the information, evidence, and assumptions used though out the prosecution had to be incorrect, false, and or unreliable,

"A sentence cannot be predicated on materially incorrect information or information so unreliable or untrustworthy that it would be unfair to proceed on basis of such evidence." US v Baylin, DC Del 1982, 535 F Supp, 1145, remanded on other grounds 696 F.2d 1030.

"Misinformation or any unfounded assumption concerning facts of importance is sufficient to render sentencing procedure invalid." US V Powell, C.A. Va, 1973, 487 F2d 325

It is indisputable that the evidence contained in the 2255 of Petitioner proves that the evidence used to prosecute this case and to sentence was absolutely untrustworthy, unreliable, and materially incorrect. How can it not be with the prosecutor destroying and or fabricating it? It is on the record that the prosecutor was berated at trial for lying to the jury and acting as a witness. Sworn affidavits attached to the 2255 document coercion of witnesses and destruction of documents evidence and Postal Inspector reports show

payoffs. The evidence of forgery in key trial exhibits is indisputable.

Petitioner further cites the Fifth and Fourteenth Amendments to the Constitution of the United States and the following federal cases, all of which concern violations of federal due process rights by prosecutorial misconduct.

Donnelly v DeChristoforo, 416 US 637(1974)

Berger v United States, 295 US 78(1935

Petitioner submits that the misconduct in this case is so great, the number of incidents and type of misconduct so varied as to require the per se reversal of Petitioner's conviction under the law.

(D) Did the Court err and fail to follow the law as per Rule 5 of 2255 and the body of case law contained in the Advisory Committee Notes that if the Petition "—raise disputed issues of fact a hearing must be held" and improperly denied Petitioner a hearing. .

The Advisory Committee Notes to Rule 5 state "numerous cases have held that the government's answer ---are not conclusive against the movant, and if they raise disputed issues of fact, a hearing must be held."

"MUST BE HELD" (emphasis added) when disputed issues of fact are raised. Clearly the broad sweep of the prosecutor misconduct and the dispute on the instances of misconduct which the prosecutor did state as the total response as "simply absurd" or which she did not Answer or dispute at all, should have caused a hearing to examine the forgeries, the fabrications, the witnesses that stated that they were coerced and or their evidence destroyed or concealed.

Petitioner requested a Hearing, the government did not oppose the Request, and the Court ignored the Request.and refused to hold a hearing.

Cases which support the Advisory Committee note are:

Machibroda v United States, 368 U.S 487, 494, 495 (1962)

United Stated v Slaerno, 209 F.2d 105, 106 (2d Cir.1961)

Romero v. United States, 327 F.2d 711, 712, (5th Cir1964)

Scott v United States, 349 F.2d 641, 642, 643 (6th Cir 1965)

Schiebelhut v United States, 357 F.2d 743, 745 (6th Cir 19966)

Del Piano v United States, 362 F.2d 931, 932, 933, (3rd Cir.1966)

Hearings should have been held into each and every aspect of each and every disputed issues of fact. Petitioner asserts that the Appeal and District Courts refused to so order them in order to keep further evidence of the prosecutor misconduct from coming into their view where they would have to rule on it. In doing so, they violated the law and the rules and denied Petitioner his due process.

(E) Did the Appeals Court fail to follow the Rules of Procedure and or to consider the Issue that the District Court had refused to follow the Rules of Procedure with respect to motion practice by:

-Failing to Grant unopposed or unanswered Motions where only the evidence and assertions of Petitioner was submitted to the Court as the government refused to respond.

-Failing to hold hearings on the unopposed or unanswered Motions

-Failing to comment or rule upon the unopposed or unanswered Motions as required by the rul

Examination of the Rules governing the Section 2255 Proceedings establish that a 2255 is a Civil Action and the rules and procedures that apply to civil actions are available to a Petitioner.

- The Advisory Committee Notes to Rule 1 state "— the fact that Congress has characterized the motion as a further step in the criminal proceedings does ***no***t mean the proceedings upon such a motion are of necessity governed by the legal principles which are applicable at a criminal trial---"

- The Advisory Committee Notes to Rule 3 state that "A motion under Section 2255 is a civil action—"

- Federal Rule of Civil Procedure 81(a)(2) states that the Rules of Civil Procedure are applicable to a 2255 motion.

No limitation is set out in the 2255 Rules which state that a Petitioner cannot avail himself of the Rules of Civil Procedure given the above.

Petitioner submits to this court that the District and the Fourth Circuit Court failed to properly consider Petitioner's 2255, failed to act on the misconduct that it has been presented with, and abused their discretion by refusing to comply with the Civil Rules of Procedure which are part of the rules governing a 2255 action

Petitioner filed with the Court several Motions including but not limited to Motions for Judgment on the Pleadings,

several Motions for Partial Summary Judgment, a Motion for Discovery. In each case the Government failed or refused to answer the motions or to otherwise oppose them at all leaving the assertions and evidence of Petitioner as the only submission to the Court. Yet in each case the Court refused to rule as requested by Petitioner or in the alternative, to hold a hearing to examine any disputed issues of fact.

Each and every magistrate and judge in this entire appeal process simply rubber stamped the Answer of the prosecutor to the 2255. Petitioner means this literally as they even adopted each and every mistake of language and conclusion verbatim including but not limited to each and every error of exclusion or refusal to answer a particular Ground or Issue

Further, the District and the Appeal Court even denied Petitioner and ruled for the government on issues that the government did not oppose or did not answer at all or in accordance with CPRules 8(b) and (d) in its answer to the 2255

It is not possible that the Appeals Court cannot honestly state that it examined all of the decisions of the previous court because in some cases there were no responses by the government to issues and the District Court did not even express an opinion on the non-apposed issues. The District Court then in turn did not rule upon several issues that the Government had not Answered. Action was Falsely claimed to have been taken upon an Answer by the government that had not been made and therefore did not exist.

Since the Civil Rules of Procedure apply to a 2255, then the Discovery rules 26(5)(b)(1) apply and the Discovery sought by Petitioner, which the government did not object to, should have been ordered and provided. The Government did not provide the Discovery and the Magistrate and District

Courts failed to grant and or order it. Given the lack of the discovery the Appeal Court could only have made its decision based on a less than adequate knowledge of the full extent of the prosecutor misconduct. A few requests for admission and or documents would have guaranteed indisputable and conclusive evidence that the prosecutor had acted illegally to the point of criminal action.

Petitioner submits to this court that the District and the Fourth Circuit Court has failed to properly consider Petitioner's 2255, failed to follow the rules, failed to act on the misconduct that it has been presented with, and acted to block additional evidence of that misconduct by refusing to rule on the motions and or to hold hearings in an illegal demonstration of clear bias and prejudice for the government

(F) Did the Fourth Circuit Appeals Court err by denying Petitioner's 2255 action and justifying the denial using a Magistrate's recommendation and a district judge's order which both failed to rule upon and were silent to issues that the government, in its response to the 2255, refused to answer at all or did not oppose in accordance with CPRules 8(b) and (d) and or to Rule 5(a) of the rules governing Section 2255 Proceedings.

Given the lack of opposition and or refusal to answer the issue by the government, the relief requested by Petitioner for the issues should have been granted as requested by Petitioner pursuant to the rules of civil procedure.

In Re the same lack of response, the Court failed to respond to Petitioner's evidence that the government failed to"– respond to the allegations of the motion" as required under Rule 5(a) of 2255

Indisputably absent from the Answer of the prosecutor, from the magistrate's recommendation, and from the district judge's order is any answer at all addressing Petitioner's three Grounds/Issues presented to this court under Issue 13 of the Preliminary Informal Brief (Grounds 10, 11,12 of the 2255).

Further, the Prosecutor did not deny the facts asserted in grounds 14 and 15 of the 2255 which were specific charges of misconduct of the prosecutor. There was no response in the Answer.

- Ground 14 dealt with "Illegal Activity in the Grand Jury room" misconduct issues.

- Ground 15 dealt with (a) Payment of money to DOJ employees by the victims. (b/c) Theft of Petitioner's property by the victims and perjury at trial. And the misconduct in covering up the thefts. (d) Perjury by the prosecutor. (e) Interfering in an FBI investigation. (f) Collusion by the postal inspector in regard to the thefts.

Rule 5(a) of 2255 states that "The answer shall respond to the allegations of the Motion." The Government failed and refused to deny or properly Answer Petitioners Grounds 10, 11, and 12, 14, 15 of his 2255. (There is no mention at all of 10,11,12) But yet the Magistrate and the District Judge all ruled in favor of an answer that was not even expressed. And the Appeals Court continued the error

Civil Rule of Procedure 8(d) states "Averments in a pleading to which a responsive pleading is required ---are admitted when not denied in the responsive pleading". Thus the failure of the government to respond at all to Grounds 10, 11. and 12 of the 2255 should have caused them to be admitted as requested by Petitioner's Motion for Judgment.

Civil Rule of Procedure 8(b) states "denials shall fairly meet the substance of the averments denied." The only Answer to the charges of Misconduct made in the 2255 was the single statement that "any allegation of prosecutor misconduct asserted by the defendant ---are simply absurd and contradicted by the record." Petitioner first asserts that such an answer did not "respond to the allegations of the Motion" as required by rule 5(a) nor does it comply with Civil Rule 8(b).

The 2255 Motion set out in detail specific instances of misconduct and how they were performed. Mere denial in one sentence as a sweeping statement to justify dozens of acts of misconduct is not responding to the allegations as required by the Rules. Secondly, the statement made by the prosecutor as her only response or answer was itself another deliberate act of misconduct in that it fraudulently stated that the misconduct was "contradicted by the record." In fact the record shows that Ms. Wesley was admonished on the record for her misconduct by the Trial Judge who stated "no lawyer is allowed to testify and there is no evidence in this case of the information that Ms. Wesley attempted to impart to the jury". The Trial judge further stated that the misconduct was "egregious and extremely unfortunate". Thus, indisputably, the prosecutor deliberately lied to the Court in response to the 2255 in furtherance of her scheme to deny Petitioner his civil rights by acts of misconduct.

Further, on the record, Ms Wesley admitted bringing charges in the indictment that she knew were false and or for which there was no supporting evidence. Thus the fraudulent response of the prosecutor to the 2255 is and of itself evidence of a continual pattern of misconduct by the prosecutor extending clear into the appeals process with deliberate false swearing in the Answer to the Court to deny Petitioner Due Process.

Additionally, during the 2255, Petitioner submitted various Motion's For Partial Summary Judgment and Motions for Judgment Upon the Pleadings. In each case the government refused to respond to the Motions and the Motions were unopposed.

Civil Rule of Procedure 81(a)(2) Applicability of Civil Rules of Procedure - states "These rules are applicable to proceedings for -- to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions. Thus the Rules of Civil Procedure were applicable to the 2255 and the requests for Partial Summary Judgment and or Motion for Judgment on the Pleadings should have been granted given the failure or refusal of the government to follow the rules in answering or their refusal to answer at all per CPR Rule 56 Sections (a) and (d) Declaratory Judgment

Pursuant to both the rules of Civil Rule of Procedure and the Rule 5(a) of 2255 the answers of the government where missing and or non responsive and the Court should have granted Petitioners Motion for Judgment on the Pleadings request that his Issues/Grounds as asserted be deemed as well pled true and accurate. Further, it should have ruled on the Motions for Partial Summary Judgment in favor of Petitioner given the lack of opposition. Had the Courts abided by the Rules and done so, Petitioner should have clearly won the 2255 Motion. Because the District Court refused to follow the rules and the Appeal Court refused to consider their error, the Court improperly denied Petitioner a fair hearing and his Constitutional Rights of due process.

(E) Did the Appeals Court and District Court fail in its duty, irrespective of Petitioner's Constitutional Rights violation claims, to police the court and to act upon the evidence of misconduct presented to it and to issue sanctions and or order an investigation of the misconduct of the prosecutor and investigating officer.

Petitioner submits that it is the duty of the Courts to insure that misconduct does not occur and that it has the right to sanction that misconduct as it sees fit. It is a well-established right and duty. It is recognized that Courts have reacted to misconduct of lawyers and others by ordering monetary fines, suspending right to practice privileges, and even imprisoning them. They have the power and the obligation. But in this instant case, the Federal Courts refused to exercise that power and to rise to their obligation and duty. Petitioner asserts that this was because the offending party was a Federal Prosecutor and that the failure to act was an abuse of the Court's discretion that denied Petitioner his Constitutional rights.

Subpoenaed Grand Jury witness Pat Kelly, at his request, visited Trial Judge Ireene Keeley in her chambers so that he could make a complaint of prosecutor misconduct. Kelly asked to have a court reporter present. Kelly submitted that he was coerced and threatened that if he did not testify in the manner, style, and way that the prosecutor wished, she would try to ruin him and name him as an unindicted co conspirator. Kelly complained further of physical contact and the destruction of his documents. The result of the Kelly complaint was that Judge Keeley made sure that Mr. Kelly, the most influential and key witness for the Defense, was blocked from testifying at trial- thus essentially rigging the trial. The clear indication is that she did so to protect the prosecutor from testimony of her misconduct.

During the pre trial hearing phase, Magistrate Judge Kaull learned that the prosecutor had caused documents that she had listed as evidence to "not exist". Those suddenly disappearing documents were exonerating evidence. Yet Magistrate Kaull did nothing and said nothing.

During the trial the record shows that prosecutor Wesley was admonished for her misconduct by the Trial Judge Ireene Keeley who stated "no lawyer is allowed to testify and there is no evidence in this case of the information that Ms. Wesley attempted to impart to the jury". The Trial judge further stated that the misconduct was "egregious and extremely unfortunate". Fraudulent evidence, testifying as a witness, all highly "egregious", but yet not one ruling reflected these facts. In fact, the trial judge having made these statements then ruled for the government and merely asked the jury to disregard.

These instances were but just a few of the documented acts of misconduct. Yet in each and every case, no matter how documented, no matter how egregious, no matter how much they prevented a fair trial and or denied Petitioner his constitutional rights, not one judge or Court ever acted to correct the situation or to sanction the prosecutor. Extreme bias and prejudice was clearly indicated that denied Petitioner his Constitutional rights.

Petitioner submits to this Supreme Court that such non responsive behavior indicated the abandonment of their duties by the Appeal Court and Judges witnessing, or being shown the documentation for, such behavior to keep the Court clear of such misconduct and to insure a level playing field for both sides and to insure Constitutional Rights. Such failure was a display of bias and prejudice against Petitioner and an abuse of discretion by the Court.

(E) Did the Appeal Court err by not considering the refusal of the District Court and or Magistrate to allow Petitioner to Expand the Record with documents that evidenced the misconduct of the prosecutor and or fraudulent information used to convict per Petitioner's request under Rule 7(a) of 28 at 2255 denied Petitioner a fair hearing of the issues.

Rule 7 of 2255 allows "if the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion." "Affidavits may be submitted and considered as part of the record."

In this case the motion was not dismissed and Petitioner sought to establish beyond a doubt that the prosecutor had engaged in misconduct and or that the trial had been a sham by filing two Motions to Expand the Record with documents "relevant to the merits of the motion." Said Motion included specific documents including affidavits of customers as to evidence concealed and or destroyed. However, the Magistrate and District Judge refused to allow this Expansion of the Record despite, or more likely because of, the very clear indication that this evidence would in fact further support the charges of highly illegal misconduct by the prosecutor.

Petitioner recognizes that it is a discretionary act to allow the Expansion of the Record. However, given the fact that the Magistrate, District Judge, and the Fourth Circuit all refused to comment upon the misconduct and or the unopposed and or unanswered misconduct issues in the face of the documentation included as Exhibits to the 2255, Petitioner asserts that it was an abuse of the discretion to deliberately keep out and or keep concealed evidence that clearly

indicated, proved, or supported that the prosecutor had engaged in illegal acts of misconduct.

Further, since the government did not oppose or other wise respond to the Motions, they should have been granted given the lack of opposition. Petitioner asserts that it was an abuse of discretion for the District Court to refuse to grant the motions and for the Appeals Court to refuse to consider that refusal as error.

CONCLUSION

Petitioner asks that this Supreme Court grant his writ of certiorari to conform the Court of Appeals decisions to existing Supreme Court decisions and authority, to establish the requirements for proper hearing of an Appeal with adherence to the rules, to promote respect for the Courts, and to correct a gross miscarriage of justice that has been inflicted upon Petitioner that if left undisturbed will promote prosecutor misconduct in the courts, illegal convictions, and the disregard for the Rules and Laws of this land.

Respectfully Submitted

Darus Zehrbach
Petitioner Pro Se
32 West Jefferson St.
Westover, WV, 26505

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 15, 2007

No. 06-7857
1:00-cr-00033-WCB-1
1:05-cv-00079-WCB

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

DARUS ZEHRBACH
Defendant - Appellant

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Niemeyer, Judge King, and Judge Duncan.

For the Court,

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

US

V CASE #1:00-CR-00033-WCB-1

ZEHRBACH

#1:05-CV-00079-WCB

PETITION FOR REHEARING EN BANC

NOW COMES Petitioner Zehrbach, filing Pro Se, and Petitions this Court for a rehearing of his appeal En Banc as follows:

I.

1

This Court's decision is indefensible.

No reasonable person would dare claim that the criminal misconduct of the prosecutor Zelda Wesley and the postal inspector Steve Randolph would not satisfy any assessment that the constitutional rights of Petitioner were denied and constitute a "substantial showing of the denial of a constitutional right." It is impossible to have a constitutionally fair trial when the government's agents are engaged in criminal misconduct to deliberately rig and fix the outcome of the trial as occurred in this case.

2. The sworn affidavits, confessions, admissions, and other evidence of the criminal misconduct of the prosecutor contained in the 2255 and its related motions would clearly satisfy the standard by demonstrating that a reasonable jurist

would find that any assessment of the constitutional claims by the district court is debatable or wrong.

3. This court has turned a blind eye to the criminal misconduct of the prosecutor Zelda Wesley and the investigating postal inspector that constitute "a substantial showing of the denial of a constitutional right". By denying a certificate of appealability the criminal misconduct consisting of forgery of evidence, receiving bribes to cause prosecution, fabrication of evidence, solicitation of perjury, coercion of witnesses, and other criminal acts are effectively and deliberately covered up.

4. Petitioner was charged, tried, and convicted of mail fraud and conspiracy to commit mail fraud in the Northern District of WV. However, a very large body of evidence exists that document and prove that the conviction was obtained by the criminal misconduct of prosecutor Zelda Wesley and the investigating postal agent Steve Randolph. This criminal misconduct was the major thrust of Petitioner's 2255 appeal.

5. Numerous incidents of the criminal misconduct of the prosecutor are well documented and are indisputable. This court even made comment as to said misconduct consisting of presenting fraudulent evidence to the jury on the record.

6. It is indisputable that prosecutor Zelda Wesley engaged in criminal destruction of documents and coercion of key defense witnesses which resulted in complaints about her criminal misconduct being made by witness Pat Kelly to the district judge. A copy of the sworn affidavit as to the events of her criminal misconduct was made a part of Petitioner's 2255 Appeal.

7. It is indisputable that during the trial the prosecutor Zelda Wesley was berated by the trial judge for illegally engaging in misconduct to act as a witness and to deliberately lie to the jury presenting them with fraudulent "evidence".

8. It is indisputable that prosecutor Wesley admitted during trial that she had brought charges against Petitioner in the Grand Jury Indictment that were false and or fraudulent. These were left for the jury to see despite her admissions.

9. It is indisputable that in Petitioner's Direct Appeal, additional evidence of other misconduct was raised which resulted in this Appeals Court stating to prosecutor Wesley during Oral Arguments that she had "took the law into her own hands". That action is clearly illegal, clearly interferes with Petition~r' s Constitutional Rights, and this court clearly recognized the misconduct that it now refuses to address in the review of the 2255 Petition.

10. It is indisputable that the evidence indicates that the prosecutor forged and or fabricated a key trial exhibit and or used a known to be forged document where her own witness who was supposed to verify her version of the story stated that the contents of the document was impossible.

11. It is indisputable from the admissions of the postal inspector at sentencing that the postal inspector and the prosecutor engaged in further criminal misconduct by concealing grand theft of Petitioner's assets by certain victims and then indicting and prosecuting Petitioner on known to be fraudulent charges.

12. It is not disputable that Petitioner's 2255 clearly lists a great number of acts of criminal misconduct by the prosecutor and provides the proof thereof and or the sworn affidavits of witnesses to the misconduct. There can be no

question by this court, and there should have been no question by the district court, that Petitioner was clearly denied his constitutional rights to a fair trial by the criminal misconduct of the government.

II.

13. The US Sentencing law states that an important part of the sentencing is to "Promote respecf' for the law. This court has failed to do so. There can be no respect for a court that promotes criminal misconduct by its law enforcement officers and prosecutors and the district courts by its refusal to address the misconduct and or to dismiss and cover it up. The effect of decisions like this can only cause the "law" to be considered a joke or a sham and a fraud.

14. The refusal of this court to address the multiple separate acts of misconduct of the prosecutor and her colluding parties the effect is to Promote and Encourage misconduct in the courts.

Ms. Zelda Wesley and the postal inspector Randolph now know that they can clearly get away with fabrication of evidence, acting as a witness, fabricating evidence, destroying evidence, forging evidence, solicitation of perjury, etc. The decision of this court was a clear decision that is PRO criminal corruption in the courts. It supports and encourages misconduct and corruption.

MATERIAL FACTS OVERLOOKED
AND OR
QUESTIONS OF EXCEPTIONAL IMPORTANCE

15. The main question then of exceptional importance is just how much criminal misconduct must this court see and in what form must it be in order for the misconduct to

become so great as to deny a prisonerlPetitioner a fair trial and or his constitutional rights.

This court has evidently decided that it must be a radically higher amount of the amazing amount of misconduct then presented by the 2255

OR

This court has completely overlooked the material facts of the misconduct and in doing so misconstrued the thrust of the 2255 that was - Did the Cumulative effect of the misconduct deny Petitioner his constitutional rights and a fair trial?

16. The converse of that question then becomes just how much criminal misconduct does this court desire or wants to allow in its courts? If this decision is left to stand, then this court is guaranteeing that it will absolutely see more misconduct it all of its courts. This misconduct will be not only by the perpetrator in this case, Zelda Wesley, but by all of the other Federal prosecutors who learn that they will suffer no consequences and will win more cases for which they earn promotions and pay raises. This courts decision clearly indicates that it does not care about the innocent or the law, and it can be sure the prosecutors will take note and avail themselves at every opportunity to win their cases at all costs or to pad their pockets with bribe money.

17. In this case receipt of money from the victims paid to Dept of Justice employees was freely admitted and contained in a Postal Inspector's report. The prosecutor knew of it and not only concealed it but also criminally lied to the district judge about it at sentencing. The various judges who read the appeal knew of it then too but also did nothing. So if this court has allowed say a $50,000 bribe to cause a prosecution, why not a

$500,000 bribe like the victims claimed to have paid. Who says that the bribe stopped with just two Dept. of Justice employees? How far did it reach? If the victims in the case can pay bribes to get Petitioner convicted, should I offer bigger bribes escape prosecution? By ducking the issues and grounds presented in the 2255 and the questions of misconduct this court has in effect stated bribes paid by people to cause the prosecution of their business competitors or enemies are fine and an acceptable practice and must not be prosecuted if the bribes are received by Dept. of Justice personnel.

18. Each and every layer of the court system from the magistrate through the district judge (and now you) have evaded comment on the misconduct and abdicated its duty to uphold the law and stop misconduct. The prosecutors know that they can rely on the rubber stamp policy demonstrated in the Northern District/4th Circuit and that they are free to be not only the prosecutor, but the judge and jury.

19. Each and every magistrate and judge in this entire appeal process simply rubber stamped the Answer of the prosecutor to the 2255. I mean literally as they even adopted each and every mistake of language and conclusion verbatim including but not limited to each and every error of exclusion or refusal to answer a particular Ground or Issue. What is the use of having judges if they refuse to read appeals and merely rubber-stamp the prosecutor's actions? Why should this court then not rule that the rubber stamp should just be issued to the prosecutor in the first place? In fact, you did do exactly that when you refused to address the issues in this case.

20. Further evidence that the courts rubber stamped the prosecutor's position is that this court along with the previous ones simply refused to even address, comment on, or render any opinion at all on several of the issues presented. They

were simply overlooked. This court then cannot honestly state that it examined all of the issues and the decisions of the previous court because there were none. Such a statement is clearly and absolutely false. Your false claim that you read and agree with decisions that do not exist and were never rendered is indefensible. In light of the refusal of all of the previous Judges and the prosecutor to even comment on then, your claim that you agree with the non existent opinions on those issues when viewed in co~unction with the refusal to comment on the clear and indisputable criminal misconduct of the prosecutor quite frankly raises some real questions about the fairness of this court.

21. Indisputably absent from the Answer of the prosecutor, from the magistrates recommendation, and from the district judge's order is any addressing of Petitioner's Grounds/Issues presented to this court under Issue 13 of the Preliminary Informal Brief (Grounds 10, 11,12 of the 2255)

MATERIAL LAWS OVERLOOKED IN THE DECISION

22. This court has deliberately (mis)construed the appeal and addressed questions that were never asked in order to avoid the tough questions on the criminal and general misconduct of the prosecutor and other government agents. This is the second time that this was done. In Oral arguments for the Direct Appeal one of the judges stated that the prosecutor "took the law into your own hands", a highly illegal and damaging act. Yet not one single line or comment was contained in the Decision. You ignored the misconduct and in doing so covered it up.

> The US Supreme Court has indicated in Dye v Hofbaurer, Case No. 04-8384 (October 11, 2005) that the courts must look at the substance of a defendant's pleadings and not merely the denial of the lower court.

23. This court has absolutely failed in its duty or simply refused to perform its duty in order to hide from the truth of the prosecutorial misconduct and to failed to look at the substance of Petitioner's pleadings as required by the Supreme Court under Dye.

24. The Dye case and this instant one are exactly the same situation as Dye raised issues regarding prosecutorial misconduct in a post conviction motion. Exactly like Dye, the courts actedjust like you and denied relief, but in the opinion(s) did not make any reference to any of the claimed federal errors in the case and avoided the issues.

Just like Dye, in an effort to hide from the truth of prosecutorial misconduct that rose to the level of criminal, this court has seized upon procedural rules or focusing on non raised issues to deny relief.

25. The Dye case should have indicated to this court that courts are no longer free to ignore the merits of a claim simply because they have found some procedural reason to do so.

26. The Supreme Court noted in Dye that just as in this case, specific allegations of prosecutorial misconduct were outlined in the Petitioner's brief with more than sufficient particularity.

27. The Supreme Court stated in Dye that:
"As the prosecutorial misconduct claim was presented properly, it, and any other federal claims properly presented, should be addressed by the Court of Appeals on remand"

28. Petitioner further cites the Firth and Fourteenth Amendments to the Constitution of the United States

and the following federal cases, all of which concern violations of federal due process rights by prosecutorial misconduct.
Donnelly v DeChristoforo, 416 US 637(1974)
Berger v United States, 295 US 78(1935)

29. A criminal act is a criminal act regardless of who does it. And that includes criminally corrupt federal prosecutors or anyone who acts like a crook whether they wear a badge or not.

30. "A sentence cannot be predicated on materially incorrect information or information so unreliable or untrustworthy that it would be unfair to proceed on basis of such evidence." US v Baylin, DC Del 1982, 535 F Supp, 1145, remanded on other grounds 696 F.2d 1030.

"Misinformation or any unfounded assumption concerning facts of importance is sufficient to render sentencing procedure invalid." US V Powell, C.A. Va, 1973, 487 F2d 325

It is indisputable that the evidence contained in the 2255 of Petitioner proves that the evidence in this case was absolutely untrustworthy, unreliable, and materially incorrect. How can it not be with the prosecutor destroying and fabricating it? It is on the record that the prosecutor was berated at trial for lying to the jury and acting as a witness. Sworn affidavits attached to the 2255 document coercion of witnesses and destruction of documents/evidence. This court clearly would much rather make sure that an innocent man went to and stayed in prison then to dare criticize some badge wearing corrupt/criminal. No one should have to remind you that the acts of misconduct described in Petitioners 2255 are illegal. No one should have to tell you

how unfair and or illegal such practices act to deny an accused his constitutional rights. And no one should have to remind you that you should act to restrict and punish misconduct and to protect citizens from such acts by government employees.

31. Petitioner submits to this court that this court has failed to properly consider Petitioner's 2255 and failed to act on the misconduct that it has been presented with. Further, Petitioner submits that the misconduct in this case is so great, the number of incidents and type of misconduct so varied as to require the per se reversal of Petitioner's conviction under the law.

WHEREFORE, for all of the reasons stated above, it is respectfully requested that petition for panel rehearing and or en banc rehearing be granted and that the conviction of Petitioner be reversed.

Respectfully submitted,

Darus Zehrbach, Date Signed March 6th, 2007
Petitioner Pro Se

32 West Jefferson St., Westover, WV., 26505

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by US Mail to Zelda Wesley, United States Attorneys Office for the Northern District of West Virginia, Suite 300, 320 West Pike St., Clarksburg, WV., 26301 this _____ day of _____ 2007

Darus Zehrbach

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-7857

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

versus

DARUS ZEHRBACH,
Defendant - Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. W. Craig Broadwater, District Judge. (1:00-cr-00033-WCB; 1:05-cv-00079-WCB)

Submitted: February 15, 2007

Decided: February 26, 2007

Before NIEMEYER, KING, and DUNCAN, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Darus Zehrbach, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Darus Zehrbach seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2255 (2000) motion.

The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253 (c) (1) (2000). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c) (2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and conclude that Zehrbach has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 23, 2007

No. 06-7857
1:00-cr-00033-WCB-1
1:05-cv-00079-WCB

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

DARUS ZEHRBACH
Defendant - Appellant

MANDATE

The judgment of this Court, entered 2/26/07, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued to the district court and constitute the mandate of this Court.

/s/ Patricia S. Connor
CLERK

JUDGMENT

FILED: February 26, 2007

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 06-7857
1:00-cr-00033-WCB-1
1:05-cv-00079-WCB

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

DARUS ZEHRBACH
Defendant - Appellant

Appeal from the United States District Court for the Northern District of West Virginia at Clarksburg

In accordance with the written opinion of this Court filed this day, the Court denies a certificate of appealability and dismisses the appeal.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CURCUIT

US

V

ZEHRBACH

06-7857
1:00-CR-00033-WCB-1
1:05-CV-00079-WCB

PRELIMINARY INFORMAL BRIEF

NOW COMES Petitioner, Darus Zehrbach, filing Pro Se, and submits this Preliminary Informal Brief as per this courts preliminary informal briefing order as follows:

1. JURISDICTION

A. The appeal is from the order titled ORDER ADOPTING REPORT AND RECOMMENDATIONS dated October 20th, 2006 signed by Judge Broadwater in the Untitded States District Court for the Northern District of West Virginia. While Judge Broadwater sits in Martinsburg, WV., the filings for the case are maintained in and the original trial and conviction were in the US District Court located in Clarksburg, WV. Judge Keeley recussed herself from the appeal and Judge Broadwater took over.

B. The date of the Order being appealed is dated October 20th, 2006 and noted as filed that same day.

2. TIMELINESS OF APPEAL.

Notice of Appeal was filed in the US District Court for the Northern District of WV on 10/26/06 (receipt for payment of the court fees dated that day of 10/26/06)

3. CERTIFICATE OF APPEALABILITY

The district court took no action as to a certificate of appealability and failed or refused to comply with Rule 22(b)(1). The lower court did not deny a certificate of appealiability of any of the issues (and in fact failed to rule on three of the Grounds at all), nor did it issue a certificate for those Grounds which it did rule on.

Rule 22(b)(1) states that "--,the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue." The district judge failed or refused to do either of the two required actions. Petitioner requests that this circuit court issue a certificate as permissible under Rule 22(b)(1) which states that when the above has occurred "--the applicant may request a circuit judge to issue the certificate." And that when "--no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals."

A certificate of appealability should be issued if the applicant has made a substantial showing of the denial of a constitutional right. Petitioner Zehrbach has raised substantial issues and has made a substantial showing of the denial of a constitutional right(s). Given that fact and the specific fact that the court chose not to deny appealability, a certificate of appealability should be granted by this Court of Appeals.

Petitioner asserts that he is entitled to proceed on appeal with his petition and petitions this Court for permission to do so.

Petititioner asks the court of Appeals to review additional issues that were not certified for review by the

district court and which arose from the mishandling of the appeal by the lower court as noted below.

4. ISSUES ON APPEAL.

ISSUE 1. (Ground One of 2255)

THE PROSECUTOR SOLICITED KNOWN PERJURY AFTER ACTING TO DESTROY OR CONCEAL EXONNERATING EVIDENCE AND TO COERCE WITNESSES.

Multiple would be witnesses for Zehrbach have provided sworn affidavits that they were maliciously and illegally coerced in order to change their testimony and their documents seized and destroyed. Said witnesses included ex US military officers with knowledge of military contracts which Zehrbach had engaged in including but not limited to Pat Kelly and his partner Steven Hoeser, and Zehrbach customer Terry Morris.

1) Witnesses including Hoeser, Kelly, and attorney Terry Bostic can establish that the prosecutor and the investigating postal inspector received in discovery from multiple sources documents from such entities as US Senators, Lochheed, USAir Force, NATO commander that documented that the charges made by the prosecutor where known to be fraudulent. These same witnesses can also testify and or have already provided affidavits that the documents that proved the charges were frauduhmt were made to disappear by the prosecutor and that the witnesses were threatened with IRS audits and or destruction of their life or business if they did not keep silent. Kelly's meeting additionally involved the Justice officials physically handling him and being shouted at to change his testimony.

2) When witness Kelly would not change his testimony to the fraudulent story that the prosecutor wanted him to tell he was threatened with being charged with perjury and or being named as a coconspirator. During the pretrial proceedings prosecutor Wesley admitted that there was no basis for such claims or charges.

3) Part of the claims made to the jury by the prosecutor was that Zehrbach never had any military contracts and that the engines and products that he sold had never been made or tested in any form. However, in stark contrast to this claim made at trial where she solicited testimony to that effect, Wesley allowed Zehrbach post conviction to go to the Middle East to work on those exact specific military engines and or engine models and types which she had fraudulently claimed did not exist, did not work, were never made, etc. Said authorization to travel was given without argument by Wesley.

4) A key part of the trial was an all out effort by the prosecutor Wesley to "dirty up" Zehrbach by presenting witnesses at trial to the effect that Zehrbach's company had never paid and or never filed tax reports. However, in pre trial discovery Wesley sent a letter to both the attorney for Zehrbach and for co defendant Demus stating specifically that she (Wesley) had received all of the tax records for all of the years in question and that the tax records were complete. But Ms. Wesley then asked the IRS agents to testify that said records did not exist and that Zehrbach had not filed and or paid taxes. Wesley again caused records to disappear and solicited perjury in regard to same.

5) Would be Defense witness Terry Morris, a customer states that he was threatened to change his story and refused to appear out of fear.

6) Defense witness Greg Moser states that he was threatened with massive and repetitive IRS audits ifhe did not change his testimony or refuse to appear.

7) Trial Judge Keeley refused to let the men who had been threatened testify and or would not let them testify about the misconduct of the prosecutor and arresting officer. Would be Defense Witness Pat Kelly had gone straight to the Judge after the incident of misconduct and demanded a court reporter to file a complaint. Having heard the complaint months before the trial, Judge Keeley sat on the complaint, refused to take action against the prosecutor, and barred the appearance of Kelly so that the Jury did not learn of the government efforts to criminally ftaudulently mislead them by way of coercion and destruction of documents.

8) By comparing the transcripts of the Grand Jury versus the claims and the solicitation of statements from the witnesses for the prosecution it can be shown indisputably that the prosecutor had full knowledge that a number of statements that she solicited were known to be petjury and that the solicitation of said perjury was calculated.

ARGUMENT

It is not disputable that the misconduct occurred given the sworn affidavits in hand, the comparison between court records, and viewing of the documents available that prove solicitation of perjury and or the bringing of known to be fraudulent charges. Petitioner Zehrbach argues that had the Jury known that:

1) The government had destroyed exonerating evidence

2) The government had coerced critical

witnesses.

3) A number of the charges made by the government were known by the government to have been fraudulent claims for which they rigged the testimony and evidence.

4) The prosecutor had solicited known perjury from the bulk of its witnesses about key facts.

5) The government had made evidence and records that only it had "disappear"

the Jury would have surely have acquitted Zehrbach of all charges. In fact, it is known that the postal inspectors had been prosecutor and grand jury "shopping" after a previous grand jury in another city had already refused to indict. The difference in willingness to indict Petitioner asserts lies with the willingness of prosecutor Wesley to engage in misconduct on a very broad and aggressive scale.

ISSUE 2. (Ground Two of 2255)

THE PROSECUTOR AND POSTAL INSPECTORS CONCEALED OR DESTROYED EXONNERATING DOCUMENTS AND INTERVIEWS AND REPORTS AND THE INTERCEPTION OF ATTORNEY CLIENT MAIL THAT WAS PRIVILEDGED IN NATURE.

This issue is an expansion ofiSSUE 1 where part of the documentation is found in the records of a pretrial hearing.

1) Known pretrial Collusive lying on the record to Magistrate Kaul to conceal exonerating documents occurred which cannot be denied. During a hearing to compel the

turnover of documents that the government had referred to, prosecutor Wesley told the Magistrate Judge that despite all of the references to the documents they "didn't exist", However, several weeks later, when discovery was provided to the defense, a few of those "non existent" documents were found to be mixed into the piles of paper provide. One of those documents was government-intercepted letters between Zehrbach and his attorney that was privileged in nature.

2) Interviews with eighteen people were discovered as missing along with six sets of documents known to have been taken by postal inspectors from the interviewed parties. All of the interviews and documents were post trial discovered as having occurred and all of the evidence gathered was exonerating. Yet the government destroyed or concealed all of the information from Defense and from the Jury and solicited perjury in the vacuum left by the absence of these records.

3) It was discovered Post trial that several people unbeknownst to the Defense had come forward and provided exonerating documents to the government. The prosecutor concealed these documents and records and the existence of the willingness of the witnesses to testify from the Defense.

ARGUMENT

Petitioner Argues that by illegal and corrupt and or criminal misconduct the prosecutor Zelda Wesley and postal Inspector Randolph denied Zehrbach a fair trial by concealing pro Defense witnesses and exonerating records from Defense. Zehrbach asserts that had these witnesses testified and or the information which they possessed or had the concealed documents become known to the jury. Petitioner would have been acquitted of all charges.

ISSUE 3 (Ground Three of 2255)

THE PROSECUTOR MADE IMROPER STATEMENTS TO THE JURY AND OR JUDGE AS IF SHE WAS A WITNESS THAT SHE KNEW WERE FRAUDULENT STATEMENTS.AND DELIBERATE PERJURY. FURTHER, SHE PERSONALLY VOUCHED FOR THE CREDIBILITY OF HER WITNESS.

The prosecutor Zelda Wesley committed sixteen separate acts of misconduct where during the closing arguments and or rebuttal, she made statements as if she were a witness stating "facts" which were not of record as if she were a witness herself. Further, these stated "facts" were known to be fraudulent and or criminal perjury stated to the jury. One of these acts of misconduct was stated by Judge Keely on the record as "egregious and extremely unfortunate" and for which Wesley was chastised.

1) Prosecutor Wesley lied to the jury that willing defense witness Dick Perry was forced to testify on behalf of Zehrbach or Zehrbach would never give him his engine. No evidence exists to support that claim.

2) During Rebuttal, Wesley stated fraudulently that SHE had seen no evidence of checks paying the invoices of suppliers. The intent was to convince the jury that Zehrbach had perjured himself about buying the parts and to indicate that if Zehrbach did not defraud the victims, then he had at least defrauded the creditors. This fraudulent claim resulted in an admonishment from the judge who berated Wesley on the record and stated the act was egregious.

3) During Pretrial hearings, Wesley lied to the Court that she had a new victim that she was talking to. In fact she

referred to Defense witness Greg Moser who was being threatened and or coerced to change his testimony. She just lied about it.

4) Wesley lied to the jury that victim Horton paid money to Zehrbach that she in fact knew was paid to her witness Olson. Wesley lied and acted as a witness.

5) Wesley lied to the jury telling them that the victims had never cancelled their orders. She knew that the letters from the victims to Zehrbach specifically state the words "cancel my order" or "I withdraw my order". Wesley lied and acted as a witness.

6) Wesley lied to the jury that Zehrbach's appeal had failed in January 95 and that Zehrbach knew it then but concealed it. This was a known fraudulent statement of facts not supported by any record. In fact the Court record shows that the Williamsport Court sent Zehrbach in Order in May 95 after Zehrbach had already sent out the progress payment letters. Wesley lied to the jury about the date of the Order and moved the date forward four months in order to mislead the jury about a major important fact.

7) Wesley testified as if a witness and lied to the jury that Zehrbach had never done TB testing when all testimony was that he had. Wesley then testified as if an expert witness and gave her own explanation of TBO and how it is derived that was fraudulent.

8) Wesley lied to the jury stating that Zehrbach's company was formed for the sole purpose to defraud people. There was never any evidence of the purpose of formation. Further, she had a very long list of customers who had received all that they had ordered and were pleased with the results including a number of witnesses at trial so therefore

her stated purpose could only be false. The statement by Wesley was a vicous lie, spoken with fraudulent intent to deliberately mislead the jury.

9) In the Answer to the Direct Appeal made to this Appeal's Court, Wesley fraudulently lied that the A Sections had never been planned or made. If that is her stance then she deliberately solicited perjury about the A sections from her witnesses Olson, De Valle, Longo, and Simkanin who all testified that they had worked with the A sections and they had been made. Wesley lied to this court to win her case.

10) During Sentencing Wesley lied to the court that Zehrbach was a violent man who had been involved in a threat fax. No evidence can be produced in support of that claim. She concealed that a Justice Deptment employee whose family was paid off and or bribed by Simkanin and where the FBI picked up that employee sent the fax.

11) Wesley illegally vouched for the credibility of her witness curt Longo who was caught in perjury by Defense in an obvious attempt to bolster his credibility.

12) Wesley lied to the lower court and to this Appeal court by fraudulently stating that Zehrbach had not filed a police report or made complaint of thefts and breakins committed by the victims. In fact Wesley had a copy of the Morgantown Police report. Further, Zehrbach had sent a letter to the US Attorney in regard to these years before the indictment and his attorney had also requested an investigation.

13) Wesley repeatedly and falsely informed the jury details of the contracts by and between the victims and Zehrbach acting as a witness. Further, she fraudulently told the jury that the victims had paid their final payment

(payment in full) when in fact not one of them had. Wesley acted as a witness and lied to the jury about facts not of record.

14) Wesley lied to the jury in rebuttal when she claimed that Zehrbach had sold the same engines twice to the victims. No evidence exists to support such claim. Wesley acted as a witness and lied to the jury about facts not of record.

15) Wesley lied to the Jury telling them that witness Van Grouw was "ready to fly". No such evidence was ever introduced. In fact, evidence concealed from the jury shows that Van Grouw was not ready to fly for several years after the trial. Wesley acted as a witness and lied to the jury about facts not of record and which were fraudulent.

16) Wesley acted as a witness and lied to the Jury that the only engine that Zehrbach had ever worked on was that of terry Morris. This fraudulent statement is in total conflict with all testimony from all of her own witnesses and all defense witnesses.

ARGUMENT:

Sixteen separate acts of specific and calculated misconduct involving acting as a witness and lying to the court and or jury about facts not of record, or in conflict with all evidence, and or acts to vouch for the credibility of her discredited witness are indicative of the broad and pervasive nature of the misconduct of prosecutor Wesley which was intended to rig the proceedings. Petitioner argues that the cumulative effect of such a massive illegal campaign of misconduct denied him a fair trial. Further, Petitioner argues that had the jury known the fraudulent nature of the statements made by prosecutor Wesley that they would have

acquitted him.

ISSUE 4. (Ground Four of 2255)

THE PROSECUTOR USED A FORGED OR FABRICATED DOCUMENT AT TRIAL THAT SHE KNEW TO BE FORGED AND WHERE EVIDENCE SUGGESTS THAT SHE FORGED IT HERESELF

Count II and a financial claim of Count I was that victim Simkanin received a "fax" in December 1995 from Zehrbach's company telling him that his propeller was ready, send his money. This "fax" was the government's key exhibit.

1) Zehrbach stated that the document was a forgery.

2) The fax has seven major and clearly apparent flaws in it which reveal it to be a Forgery without question. The flaws make the document unarguably a forgery.

3) The "fax" makes statements of fact which are physically impossible which the government's own witness Simkanin agreed to and which make it clearly a forgery.

4) Prosecutor Wesley avoided all examination of the statement that the fax was forged and refused to question anyone about it indicating knowledge of its forged nature where when coupled with the statements of her own witness as to its flaws indicate that it was quite probably Wesley or an investigating officer who forged the document.

5) An ex Federal Treasury agent provided an affidavit to Wesley infonning her that the basis of her charge against Zehrbach was false based on facts that he had

personally witnessed and that her witness Simkanin was a known forger. Despite this advance information from a Federal Agent, Wesley indicted and pursued the charges based on a document she knew was a forgery and solicited known perjury.

6) The trial Judge refused to allow witness Jerry Johnson to provide evidence that would have proved that the document was a forgery.

ARGUMENT

Petitioner can prove from the examination of the trial document, which Zehrbach had stated to be a forgery, and the trial witness Simkanin's statements, that the document used to convict Zehrbach was in fact a known forgery. Further, Zehrbach can show evidence that the prosecution knew that the document was a forgery where possibly the prosecutor was the forger. In all cases, Zehrbach was falsely and fraudulently by use of a clearly forged document. Had the jury known that the document was forged and of all of the clear indications of forgery, it would not possibly have convicted Zehrbach of the counts relating to the forged document. Further, had the jury known that the prosecution used a known to be forged document to prosecute Zehrbach, it is believed that it would have so discredited the government that the jury would have acquitted Zehrbach on all counts.

ISSUE 5. (Ground Five of 2255)

TRIAL EXHIBITS WERE TAMPERED WITH SUCH THAT KEY SECTIONS WHICH THE PROSECUTOR WANTED TO MAKE CLAIMS ABOUT WERE REMOVED AND CONCEALED FROM THE JURY.

1) The Government placed exhibits of "brochures" of Petitioner claiming Falsely that they were the full and complete, as received by the victims brochures.

2) Despite the same claim, all of the brochures submitted where missing different parts and or pages so that none of the brochures matched.

3) Comparison to the full brochures provided by Zehrbach as being the full brochures by the defense witnesses will prove that the documents were tampered with leaving out specific sections which the government wanted to make claims about. The missing sections are conspicuous in their absence in light of the charges or claims made by the prosecutor in regard to the subject of the missing sections.

ARGUMENT

By deliberately removing sections of the brochures and thereby tampering with the trial evidence, prosecutor Wesley could solicit fraudulent statements about the products which Petitioner sold and or about the brochures without the Defense being able to simply point out the falseness of that claim by pointing out the appropriate section of the brochures. Had the jury known that the trial exhibits had been tampered with and the statements made in regard to the brochures fraudulent / perjury, it is believed that they would have ceased to believe the government case to the point of acquitting Zehrbach on all charges.

ISSUE 6. (Ground Six of 2255)

THE PROSECUTOR ENGAGED IN OTHER MISCELLANEOUS MISCONDUCT IN ADDITION TO THOSE NOTED IN ISSUES 1 THROUGH 5 IN ORDER TO DENY ZEHRBACH A FAIR TRIAL.

1) THE PROSECUTOR WESLEY FILED AN INDICTMENT WHICH CONTAINED A KNOWN TO BE FRAUDULENT CLAIM WHICH SHE LATTER ADMITTED HAD NO BASIS IN FACT AND WHICH NO EVIDENCE HAD BEEN PRESENTED TO THE GRAND JURY ON. Despite the latter admission, this indictment containing the known to be fraudulent charge that the victims had been investors in Zehrbach's company and had been cheated on a stock scam was knowingly presented to the trail jury by the prosecutor as a quasi statement of fact to "dirty up" Zehrbach. The lack of grand jury evidence and how the charge appears in the indictment along with the admission that the charge had no basis indicates that the prosecutor had tampered with the grand jury indictment. the trial jury was again lied to and presented known to be fraudulent statements by the prosecutor which must have had an impact on the jury and which the defense never had the opportunity to attack.

2) THE PROSECUTOR CONCEALED THE WHEREABOUTS OF A MATERIAL WITNESS WHOM SHE KNEW WAS IN FEDERAL PRISON THAT THE DEFENSE WAS SEARCHING FOR TO CALL AS A WITNESS. The Defense was searching for the victims partner in their competing engine business, Don Schutt. Defense learned post trial that Schutt was in a Federal Prison.

3) THE PROSECUTOR LIED TO THE JURY ABOUT A RULING MADE BY THE TRIAL JUDGE THAT THE JURY HAD NOT HEARD. The trial court judge ordered that the Defense could not bring to court all of the engines which the victims had ordered and put them on display. However, the prosecutor mislead the jury into believing that the engines did not exist and Zehrbach chose not to bring them to put on display.

4) THE PROSECUTOR FRAUDULENTLY CLAIMED THAT ZEHRBACH HAD MADE A FALSE REPORT TO THE FBI THAT VICTIM SIMKANIN WAS PLANNING A VIOLENT ACTION thereby falsely indicating that Zehrbach was a man who made false statements. In fact, Simkanin had been arrested by Federal Agents and denied bail due to discovery of a plot by Simkanin to "kill a couple of Federal Judges". Wesley deliberately lied to the Court and acted as a witness again.

5) THE PROSECUTOR ASKED ZEHRBACH QUESTIONS IN HIS CROSS EXAMINATION FOR WHICH SHE HAD NO BASIS TO ASK.

ARGUMENT

The evidence is indisputably that the prosecutor brought an admitted known to be fraudulent charge against Zehrbach. Given the large body of evidence in the other charges, it would appear that if she would willingly file a known to be fraudulent charge once, she would do so on the other charges. The jury saw the known to be fraudulent charge and no instruction was given to the jury to admit that it was a false charge thereby making sure that Zehrbach would not receive a fair hearing.

Additional perjury, fabrication of evidence, concealment of evidence, and or misleading of the court and jury were committed by prosecutor Wesley as further extensions of the misconduct listed in the preceeding Sections. Had the jury known that the government admittedly filed known to be fraudulent charges, concealed witnesses, and lied to them, it is reasonably believed that it would have acquitted Zehrbach.

ISSUE 7. (Ground Seven of 2255)

THE GOVERNMENT ILLEGALLY INTERCEPTED PRIVILEGED ATTORNEY CLIENT MAIL. IT ALSO INTERCEPTED AND DESTROYED OTHER DOCUMENTS FROM CUSTOMERS AND WOULD BE WITNESSES.

1) It is known from a blunder by the prosecutor that the government was intercepting mail that was by and between Zehrbach and his attorney. Some of the intercepted mail was found in the discovery documents. By illegal means the government knew the defense plans.

2) It is known from calls by customers and mends that Postal Inspectors were intercepting and reading mail sent by them. These documents never showed up in discovery nor were they delivered to Defense. The Postal Inspectors or the prosecutor destroyed or concealed the mail. Some of these documents were exonerating documents sent by witnesses in an attempt to help Zehrbach.

ARGUMENT

It is clearly illegal for the government to intercept and read the privileged attorney client mail and to gain illegally an insight into the Defense. It was also clearly illegal for the government to intercept mail and refuse to turn it over keeping exonerating evidence and willing would be witnesses away from Defense. By such illegal means the government insured that it would deny Zehrbach a fair trial.

ISSUE 8 (Ground Eight of 2255)

NEWLY DISCOVERED EVIDENCE OF VICTIM AND GOVERNMENT WITNESS PERJURY PROVES THAT

ZEHRBACH WAS FRAUDULENTLY CONVICTED.

1) FAA TESTING AND DOCUMENTS OBTAINED POST TRIAL COMPLETELY AND INDISPUTABLY PROVE THAT ALL OF THE ALLEGATIONS AND CLAIMS MADE BY EVERY ONE OF THE GOVERNMENT'S WITNESSES AND BY THE GOVERNMENT IN REGARD TO THE ENGINES WERE FRAUDULENT AND MAKE THE CHARGES PHYSICALLY IMPOSSIBLE. The FAA (Federal Aviation Administration) tested and or certified and or approved for flight as be good running, no problem engines, the exact same by serial number engines which the government claimed at trial to be non existent or defective in some manner. The FAA testing required the installation into multiple aircraft of the exact same type as the victims had (which was a very expensive and time consuming process that had to be done by the customers ofZehrbach at their cost while he was injail). The FAA documents prove that all of the government witnesses lied in regard to the engines without exception. The entire set of charges was baseless and fraudulent.

2) MORE WITNESSES WERE DISCOVERED AS HAVING BEEN COERCED TO SILENCE THEM. It was learned post trial that Zehrbach customer Terry Morris was threatened by the prosecutor Wesley with arrest (just as she had threatened Greg Moser and Pat Kelly). Morris makes three customers who were threatened with arrest in order to shut them up or change their testimony. It was essential that Morris be silenced as he was a key witness given that the only engine that the government's witnesses claim to ever have tested was Morris's - and Morris liked it and stated that it exceeded all advertised claims. Morris's experience documents that the government was coercing witnesses in order to obtain a verdict by fraud. Further, his engine, in

conjunction with the FAA tests make it absolutely clear that there was no intent to defraud by Zehrbach.

3) THE COLLUSIVE VICTIMS WHO OWNED THE COMPETING ENGINE BUSINESS BRAGGED TO WITNESSES AS TO HOW THEY PULL OFF THE SCAM ON THE COURT AND TO STATE HOW THEY HAD FRAMED ZEHRBACH. Government witnesse Olson, and victim Fagerstrom bragged to different witnesses on separate occasions as to how the had "set up" Zehbach. As part of this bragging a new and highly exonerating document surfaced that had been concealed by seven of the government witnesses. The new document proves that at least seven of the witnesses and or victims had committed deliberate perjury at trial on several major issues.

4) THE VICTIMS WHO OWNED THE COMPETING COMPANY PUT PARTS STOLEN FROM ZEHRBACH IN THEIR TRADESHOW DISPLAY. POST TRIAL. The displays were photographed by Zehrbach customers where said displays prove that the victims did in fact steal from Zehrbach and did commit perjury at trial.

5) VICTIM PAUL FAGERSTROM (WHO CLAIMED TO NOT HAVE RECEIVED AN ENGINE DESPITE DEFENSE EVIDENCE THAT HE DID) INSTALLED THE ENGINE THAT HE CLAIMED HE DID NOT RECEIVE IN HIS AIRCRAFT. Fagerstrom's own customers took photos of his aircraft with the Zehrbach engine installed. This evidence proves that Fagerstrom and at least three other witnesses committed perjury at trial in order to defraud Zehrbach.

ARGUMENT

The FAA testing indisputably proves that the fraud

charges were baseless and that the victims and their witnesses lied at trial for personal financial gain. The FAA documents prove beyond any doubt that there was not one thing wrong with the engines of Zehrbach and that they had in fact been made for the victims. Moreover, the victims own admissions that they lied and framed Zehrbach made post trial complete the evidence that the victims committed perjury. Lastly, the additional evidence post trial of even more government efforts to silence witnesses shows that the entire trial was a sham and a fraud. Had the jury known this new evidence, it is reasonably believed that the government and the witnesses would be so discredited that the jury would have found Zehrbach not guilty.

ISSUE 9 (Ground Nine of 2255)

PETITIONER ZEHRBACH WAS CONVICTED OF NOT DELIVERING PRODUCTS WHICH THE VICTIMS THEMSELVES STOLE FROM ZEHRBACH THEREBY PREVENTING THEIR DELIVERY.

Newly discovered evidence documents the victims display of goods that they stole from Zehrbach which were the exact same goods that they complained that they did not receive. The post trial newly discovered evidence of the blatant display of goods stolen from Zehrbach post trial and the nature of the specific item, when tied to the admissions of the investigating officer post trial that indicated peljury by the victims, and the previously known evidence of thefts by the victims from Zehrbach completes the picture that the victims stole goods and technology from Zehrbach so that they could start their own competing business and used the criminal trial as a tool to do so.

ARGUMENT

Had the jury known that the victims in fact did receive the goods that they ordered by theft and without paying for them in full then they would have clearly have found Zehrbach not guilty of the charges.

ISSUE 10 (Ground Fourteen of 2255)

ZEHRBACH WAS FRAUDULENTLY INDICTED BY ILLEGAL MISCONDUCT IN THE GRAND JURY BY THE PROSECUTOR.

Witnesses were screened before they were allowed into the Grand Jury room. Only those who would testify as the prosecutor ordered were allowed in. Pat Kelly, the witness who will testify that he was assaulted, coerced to change his testimony, and his evidence destroyed, was not allowed in. To prevent an easy record of the misconduct, the prosecutor illegally refused to follow the local rules where each Grand Jury witness is informed of his/her rights before a Clerk, doing so only for witnesses she wanted in the Grand Jury. In the hall outside the Grand Jury room prosecutor Wesley loudly proclaimed that she was going to have witness Terry Morris arrested for not complying with her orders with the intended chilling effect on witnesses. Witness Jeff Doddridge complained of off record comments to mislead the jury. Wesley admittedly obtained an indictment containing a charge that she knew was fraudulent and where the document given that fact appears to be altered.

ARGUMENT

A previous Grand Jury had refused to indict Zehrbach. Grand Jury "shopping" by the Postal Inspector caused a 2nd Grand Jury in another city. Had this Grand Jury knew of the criminal misconduct by the prosecutor and the postal inspector as described above and or not been mislead by the

misconduct, it is reasonable to believe that this Grand Jury also would not have indicted. In all cases, they would not have signed an Indictment containing an admittedly fraudulent charge.

ISSUE 11 (Ground Fifteen of 2255)

EVIDENCE INDICATES THAT ZEHRBACH WAS INDICTED, TRIED, AND CONVICTED AS A RESULT OF PAYOFFS TO AT LEAST TWO JUSTICE DEPARTMENT EMPLOYEES AND OR THE GOVERNMENT'S OWN ACTIONS TO QUASH INVESTIGATION OR CREATE CAUSES OF ACTION.

The postal inspector's interview records with Bill Bartollo, brother of the two Justice Department employees Anne and Ernie Bartollo document that the family was paid by the victims to cause action against Petitioner. The FBI picked up Anne Bartollo for sending an anonymous threat fax that resulted in Zehrbach being ordered by her husband to be held "pending investigation". Despite the knowledge of these payoffs and the resulting action, the Justice Department took no action and refused to acknowledge the criminal misconduct of their employees.

Approximately four years before the indictment of Zehrbach, Zehrbach had sent a request for investigation into the criminal thefts of his engines and propellers and breakins by five of the victims and two of the government's witnesses. Additionally, Zehrbach's attorney had made a written request to the US Attorney asking them to investigate the thefts. Those thefts were of the same goods which the victims claimed that they did not receive. In all cases the government took no action and refused to investigate. A complaint through the FBI outside of WV resulted in an FBI agent

being tape recorded as stating to Defense attorney Bostic that he had been instructed by the prosecutor Wesley not to investigate, to quash the investigation, as she would do nothing with it and wanted to prosecute Zehrbach instead.

Victim Simkanin had stated to witnesses that he would pay up to $1/2 Million to takeover the technology of Zehrbach' s company. The bribes to the Bartollos are known, what is not known due to the quashing of the investigation is who else received a bribe and or was the quashing of the investigation a result of a bribe.

ARGUMENT

Had the FBI fairly investigated they would have discovered and proven that the charges filed by the five men against Zehrbach were filed as a result of a civil action by Zehrbach against them for the thefts. The investigation would have shown that the men in fact did receive the goods that they ordered and did not pay for them in full defrauding Zehrbach. and revealing the criminal charges to be baseless against Zehrbach. But instead, the game was to "get Zehrbach", not to find out the truth of the matter.

ISSUE 12

DID THE CUMULATIVE EFFECT OF THE MISCONDUCT OF THE PROSECUTOR AND OR INVESTIGATING OFFICER, WHEN COUPLED WITH THE PERJURY OF THE VICTIMS, AND THE BRIBERY OF DEPARTMENT OF JUSTICE EMPLOYEES ACT TO PREVENT ZEHRBACH FROM RECEIVING A FAIR TRIAL.

It is not disputable that the prosecutor and investigating officer engaged in highly illegal misconduct. It

is documented that:

1) On the record; the prosecutor was chastised by the judge for lying to the jury and telling them facts as if she was a witness which were fraudulent.

2) The prosecutor admitted bringing charges in the indictment which she knew were fraudulent and or for which there was no evidence. Further, the structure of the indictment and the absence of any evidence or suggestion of such evidence indicates that the indictment was tampered with.

3) Three different would be Defense witnesses have stated that they were coerced and told by the prosecutor and or investigating officer to shut up and be silent or be the subject of malicious acts The prosecutor admitted that she had made baseless claims against one of the would be witnesses just as he had stated she threatened to do.

4) The investigating officer admitted post trial at sentencing that his own records show that victims lied to the jury about not receiving items from Zehrbach.

5) The prosecutor and investigating officer collusively lied to the magistrate and Defense in order to conceal exonerating documents that they claimed did not exist.

6) The prosecutor indisputably solicited known perjury from witnesses.

7) The prosecutor caused government documents to disappear and witnesses to claim those documents did not exist after admitting to her possession of those exact samedocuments in writing to Defense.

8) The prosecutor concealed the existence of exonerating documents sent to her by people who wanted to help the Defense.

9) The prosecutor and postal inspector caused the exonerating interviews with eighteen people along with at least six sets of documents to disappear and not be turned over to defense.

10) The prosecutor used an indisputably forged document to prosecutor Zehrbach where the evidence shows that not only did she know that it was forged but she is the only likely party to have forged it.

11) Trial exhibits were tampered with where key sections were removed.

12) The prosecutor asked questions on examination for which she had no basis.

13) The prosecutor had possession of privileged attorney client mail discussing the trial strategy.

14) The prosecutor intercepted exonerating mail to Zehrbach and concealed its existence and refused to turn it over.

15) The documents seized from Pat Kelly alone prove that the prosecutor brought known to be fraudulent charges in regard to the engines and solicited known perjury. The FAA documents indisputable prove that the charges were baseless.

16) Witnesses can testify that the so called victims who owned the competing engine business bragged publicly post trial how they had falsely convicted Zehrbach.

17) Payoffs were made by the victims or at least by victim Simkanin to Justice Department employees to cause Zehrbach to be indicted.

18) The government refused to investigate the thefts of goods from Zehrbach by the victims and prosecuted him for non delivery of those same items despite letters from Zehrbach years in advance of the indictiment and requests from his attorney.. But the victims post trial displayed those exact same items proving that they did steal the goods that they claimed they did not receive.

19) The US Probation refused to check on any of the pro Zehrbach evidence and or to verify or certify any of the financial claims by any of the victims and filed a known to be false PSI report or at least one that they had no clue if it was correct which was used by the court to sentence Zehrbach. Probation admitted this on 10/6/06.

20) The prosecutor sixteen times acted as a witness and told the jury "facts" not in evidence and which were fraudulent representations.

ARGUMENT

It is not disputable that the prosecutor and postal inspector and or other government employees did engage in highly illegal if not criminal misconduct that was intended to deny Petitioner a fair trial as some of it occurred on the record. In oral arguments one of the judges of this appeals court told the prosecutor that she "took the law into here own hands". The prosecutor herself admitted to making known to be fraudulent charges both in the indictment and against would be Defense witnesses. It is not disputable that the rest of the misconduct described above did occur given the sworn statements of so many witnesses and the documents and

records and testimony of so many other witnesses. The misconduct in this case is overwhelming and overwhelmed the defense. It penetrated every aspect of the case. It is impossible that Petitioner Zehrbach received a fair trail and or sentencing in light of the overwhelming evidence of such a broad range of misconduct.

ISSUE 13 (Grounds 10,11,12 of (2255)

The District Court Judge's Order adopted the Magistrates Opinion. However, that Magistate and the District Judge both failed and or refused to make any Objection to the Grounds raised by Petitioner in Grounds 10,11, and 12 of his 2255 Appeal. It is the contention of Petitioner that since two different judges in two separate Orders specifically raised no objections to those three Grounds and did not oppose those three Grounds at all nor Rule on or mention them at all in their Orders then all three Grounds must be Granted by this Court or Appeals striking down the sentence of Petitioner completely.

These Grounds were substantial and were respectively and properly raised:

GROUND 10 (OF 2255)- ZEHRBACH WAS SENTENCED IN CONFLICT WITH SENTENCING LAW IN EFFECT IN 2002 AND HIS SENTENCE UNCONSTITUTIONALLY INCREASED.

The jury only stated a global guilty. The judge alone determined all of the sentence enhancements and radically exceeded the maximum sentence allowed to be imposed given multiple Supreme Court rulings Further, the judge found Zehrbach guilty of new charges at sentencing for which he had never been tried and for which no evidence had ever been shown to the jury or sentenced for financial

damages counter to sentencing evidence stated by the government and Defense.

ARGUMENT

Petitioner's full brief will document the case law that shows that the trial judge radically exceeded here authority and exceeded the maximum sentence allowed to be imposed under the law.

GROUND 11 (OF 2255)- ZEHRBACH IS ENTITLED TO SENTENCE RELIEF FROM UNCONSTITUTIONAL ENHANCEMENTS TO HIS SENTENCE IN KEEPING WITH UNITED STATES V BOOKER.

The trial judge exceeded the statutory maximums allowed under Aprrendi V New Jersey and the maximums as stated under United States V Booker, Ring V Arizona, and Harris V United States by finding new facts to add to the sentence. Relatedly, having been informed by the investigating officer that his report showed statements by a victim that indicated that at least he and probably other victims had lied at trial about his financial damages, the judge ignored him and sentenced for the non existent damages anyhow.

ARGUMENT

The sentencing judge imposed a sentence after fmding additional facts not presented at trial and or not even evidenced at sentencing or in conflict with the sentencing evidence.

GROUND 12 (OF 2255)- THE EVIDENCE FOR THE OBSTRUCTION OF JUSTICE ENHANCEMENT MEETS NO BURDEN OF PROOF REQUIREMENT

AT ALL.

The trial judge imposed a sentence enhancement for obstruction of justice on the mere allegation that some of the victims did not receive in the mail a few letters of the hundred mailed during the subject years and so therefore she concluded that the letters were fabricated and added a sentence enhancement.

ARGUMENT

The enhancement on the basis made was indefensible as even if one chooses to believe that the victims were telling the truth, there are many reasons why such a few letters could have not been remembered as received by the few victims. There is no proof or evidence that the letters were not simply lost in the mail. There is no proof or evidence that they victims simply forgot those few letters after such a long time and out of so many letters. But there is a strong evidence that the victims simply claimed that they never received the letters because the letters were highly injurious to just those few victims daims, claims which in light of the newly discovered evidence of their fraud, theft, and peljury contained in the brief for this appeal are known to be fraudulent.

The trial judge met no burden of proof when someone says that they sent a letter and another merely denies receipt of that letter to sentence a man to prison. By her logic, every person who ever sent any mail that was lost by the post office and claimed that it was sent should go to prison. The sentence enhancement should be stricken.

5. RELIEF REQUESTED

Petitioner asks that this Court either exonerate him or order a

new trial and sentencing.

6. PRIOR APPEALS

A. Petitioner filed an appeal in this court before of a Direct Appeal of his conviction.

B. Case number 02-4864 Docket number 02-4863

(noted on Direct Appeal by my then attorney as Appeal no 02-4863(L), Cons. W /02-4864) The appeal was denied.

Respectfully Submitted,

/s/ Date Signed 11/24/06

Darus Zehrbach
Petitioner Pro Se
Westover, WV., 26505

CERTIFICATE OF SERVICE.

I certify that on 11/24/06 I mailed a complete copy of this Informal Brief and all attachments to all parties, addressed as shown below.

/s/
Darus Zehrbach

1) Zelda Wesley
United States Attorney's Office for the
Northern District of West Virginia.
Suite 300,
320 West Pike Street,
Clarksburg, West Virginia, 26301

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA MARTINSBURG

DARUS ZEHRBACH,
Petitioner,

v.

CIVIL ACTION NO. 1:05CV79
CRIMINAL ACTION NO. 1:00CR33
(BROADWATER)

UNITED STATES OF AMERICA,
Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION

On this day the above styled case came before the Court for consideration ofthe Report and Recommendation of Magistrate Judge John J. Kaull (Doc. No. 20), dated March 23, 2006, and petitioner's corresponding objections (Doc. No. 20), filed April 6, 2006. Pursuant to 28 U.S.C. § 636(b)(1), this Court conducted a de novo review of the above. As a result, the Court is of the opinion that the Magistrate Judge's Report and Recommendation (Doc. No. 19) should be, and is hereby, ORDERED adopted.

The Court further ORDERS

1) that the petitioner's Motion for Judgment on the Pleadings (Doc. 7), Second Motion for Judgment of the Pleadings (Doc. No.9), and Third Motion for Judgment on the Pleadings (Doc. No. 14) are DENIED;

2) that the petitioner's Motion for Summary Judgment (Doc. No.8), Second Motion for

Partial Summary Judgment (Doc. No. 10), and Motion for Summary Judgment (Doc. No. 16) are DENIED;

3) that the petitioner's Motion to Amend/Correct Illegal Sentence (Doc. No. 17) is DENIED; and

4) that petitioner's § 2255 motion (Doc. No.1), DENIED and DISMISSED WITH PREJUDICE based on the reasons set forth in the Magistrate Judge's Report and Recommendation. It is further ORDERED that this action be and is hereby STRICKEN from the active docket of this Court.

The Clerk is directed to transmit true copies of this Order to the petitioner and all counsel of record herein.

DATED this 20th day of October, 2006.

/s/
W. CRAIG BROADWATER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

DARUS ZEHRBACH,
Petitioner,

v.

Civil no. 1:05-cv-79
Crim no. 1:00-cr-33
(Judge Broadwater)

UNITED STATES OF AMERICA,
Respondent.

OPINION/REPORT AND RECOMMENDATION

On May 11, 2005, the *pro se* petitioner, Darus Zehrbach, filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. On May 17, 2005, the undersigned determined that summary dismissal of the petition was not warranted and the respondent was directed to file an answer.

On May 26, 2005, petitioner filed a motion to amend his § 2255 motion. That motion was granted on May 31, 2005, and the petitioner's amended § 2255 motion was filed that same day. Accordingly, the respondent was given an additional thirty (30) days from the date of that Order to file its response to the amended motion. The respondent filed a response to the petition on June 13, 2005. Petitioner filed a reply to the response on September 16, 2005.[1]

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[1]Although the response includes a Certificate of Service stating that a copy was sent to petitioner on June 13, 2005, petitioner asserts that he never received such a copy. Petitioner also asserts that he was not aware that a response had been filed until August 31, 2005, when he received a copy

This case, pending before me for a report and recommendation pursuant to LR PL P 83.01, *et seq.*, and an Order of Referral entered August 2, 2005, is ripe for review.

I. Procedural History

A Conviction and Sentence

Petitioner was named in a two count indictment filed on December 6, 2000, in the Northern District of West Virginia. Count one charged that petitioner conspired to commit mail fraud from August of 1992 through the Summer of 1996, in violation of 18 U.S.C. § 371. Count two charged petitioner with aiding and abetting a mail fraud in violation of 18 U.S.C. § 1341.

Petitioner pleaded not guilty to the charges and proceeded to trial by jury on March 7, 2002. Petitioner was found guilty of both counts on March 26, 2002. On October 18, 2002, petitioner was sentenced by the Honorable Irene M. Keeley, to 51 months imprisonment and 3 years of supervised release.[2]

B. Direct Apneal

Petitioner filed a direct appeal of his conviction and sentence on October 25, 2002. As grounds therefor, petitioner asserted the following:

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of his docket sheet, and a copy of the response, from the Clerk of Court. Upon this discovery, petitioner promptly filed a reply to the response

[2]On July 26, 2005, Judge Keeley recused herself from this case pursuant to a motion by the petitioner. As a result, the case was transferred to the Honorable W. Craig Broadwater.

(1) there was insufficient evidence to support the jury verdict;

(2) the district court erred by denying the defendants' motion for a new trial;

(3) the district court made evidentiary errors, the cumulative effect of which violated the right to a fair trial; and,

(4) the district court made sentencing errors.

See United States v. Zehrbach, 98 Fed.Appx. 211 (4th Cir. 2004) (unpublished). Petitioners' conviction and sentence were affirmed on appeal May 11, 2004. *Id.*

C. Federal Habeas Corpus

Zehrbach's Contentions

(1) the prosecutor solicited known perjury after acting in collusion to destroy or conceal exonerating evidence and to coerce witnesses with regard to

(a) petitioners' military contracts,

(b) petitioner's tax records, and

(c) whether or not the victim's made "final" payments;

(2) the prosecutor and postal inspector concealed or destroyed exonerating documents and interviews with regard to

(a) Pat Kelley's documents,

(b) certain documents that the prosecutor informed the Court did not exist, but later produced without explanation during discovery,

(c) the disappearance of 18 interviews conducted by the prosecution and certain documents taken from those interviewees;

(3) the prosecutor made improper statements to the court and jury, as if a witness, which she knew to be fraudulently false when she

(a) said that the testimony of Dick Perry for the defense was "forced,"

(b) said that she had not seen certain checks,

(c) said Greg Moser was a newly discovered victim,

(d) said Horton paid money to Zehrbach when he actually paid money to Larry Olson,

(e) said the victims never cancelled their orders,

(f) said petitioner never told the victims that he was going to jail in 1995,

(g) said petitioner never did TBO testing,

(h) said petitioners' company was formed with the sole intent to defraud people,

(i) told the appeals court that the "A" section

had never been planned or made,

(j) told the sentencing court that petitioner was violent,

(k) vouched for the credibility of Curt Longo, a prosecution witness,

(l) said petitioner never filed a police report for the alleged theft of his products by the victims,

(m) said that the victims complied with the terms of the contract by making all the required payments,

(n) said petitioner sold the same engines twice,

(o) said Van Grouw was ready to fly when no such evidence was introduced,

(p) said that the only engine that worked was the one for Terry Morris;

(4) petitioner was convicted using a forged or fabricated document which the prosecutor either knew was forged or participated in the forgery herself;

(5) trial exhibits were modified by the removal of key sections which the government wanted to make claims about;

(6) the prosecutor engaged in other miscellaneous misconduct to deny the petitioner a fair trial when she

(a) obtained an indictment which contained a false claim,

(b) concealed from the defense that Don Schutt was in federal prison,

(c) made it appear as if petitioner did not bring the engines to Court because he could not produce them, although he was actually precluded from doing so by a ruling of the judge,

(d) told the trial judge petitioner made a false report against one of the victims,

(e) told petitioners' attorney that the victims hired a "hit man" to get petitioner, then refused to disclose more details so petitioner could protect himself,

(f) asked petitioner if he had forged any of the defense exhibits when she had absolutely no basis for such a question;

(7) the government intercepted privileged attorney client mail and other mail;

(8) newly discovered evidence of victim and government witness perjury proves that petitioner was fraudulently convicted as relates to

(a) FAA testing, certification, and documentation,

(b) the prosecution threatening Terry Morris with arrest if he testified for defense,

(c) the victims bragging about how they "pulled off" framing petitioner,

(d) five of the victims owning a competing business and putting parts stolen from petitioner on display after his conviction,

(e) witness Dick McCoon's financial motives for committing perjury,

(f) victim Fagerstrom actually receiving an engine and pictures proving it;

(9) petitioner was convicted of non-delivery of products which the victims themselves stole from him;

(10) petitioner was sentenced in conflict with sentencing law in effect in 2002 and sentence was unconstitutionally increased;

(11) petitioner is entitled to sentence relief from unconstitutional enhancements to his sentence in keeping with Supreme Court's decision in *United States v. Booker*;

(12) the evidence for the obstruction of justice enhancement meets no burden of proof requirement;

(13) petitioner was improperly sentenced due to the failure of the United States Probation Department to verify unsubstantiated victim claims of monetary damages;[3]

(14) petitioner was fraudulently indicted by illegal

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[3]Grounds one through thirteen are found in petitioner's original § 2255 motion. Grounds fourteen through sixteen are found in petitioner's amended § 2255 motion.

activity of the grand jury because

(a) after previously failing to indict petitioner, the postal inspector shopped around for a prosecutor and new grand jury to present case to,

(b) the prosecutor engaged in various acts of misconduct during the proceedings, going so far as to tamper with the indictment by inserting a false claim;

(15) evidence indicates that the petitioner was indicted, tried, and convicted as a result of payoffs to Department of Justice (DOJ) employees as evidenced by

(a) the fact that the grand jury never heard evidence that victims pursued criminal charges only after petitioner filed a civil suit against them,

(b) the victims hired DOJ employees or family members to help create incidents to put petitioner in prison,

(c) the jury never heard testimony that the victims had a financial motive to fabricate evidence,

(d) the jury never heard evidence that the victims tried to bribe or coerce petitioners' employees into helping them steal petitioner's products,

(e) the jury never heard evidence that the victims stole from petitioner,

(f) BOP employees and their families colluded to hold petitioner in jail so the victims could steal his products and help frame him on the charges in this case,

(g) postal inspector was out to get petitioner so did not fully investigate the claims of the victims, and in fact, helped the victim's obtain petitioners' trade secrets and proprietary business information, even though the inspector knew the victims were also petitioners' competitors,

(g) prosecutor lied to court of appeals by stating that petitioner never requested an investigation or filed a police report with regard to the alleged theft of his property by the victim's and DOJ employees and their families; and,

(16) when imposing sentence, the trial judge did not meet burden of proof requirements for the various aspects or factors as required and the sentence conflicts with the Court's own Orders because

(a) the claims of Al Prinz were unsubstantiated,

(b) victim Jim Harms was dead and could not dispute fact that he was a victim,

(c) there was insufficient evidence to sustain a conviction under Count 2,

(d) there was no evidence produced as to the 380 hp and 500 hp engines,

(e) the Court sentence petitioner for eight victims, but in denying his motion for judgment of acquittal said that there was evidence of fraud as to only four victims,

(f) petitioner was charged with defrauding one victim who paid money to the wrong person and petitioner should not be held accountable for that mistake,

(g) the evidence showed that one of the victims did receive an engine.

Based on these alleged errors, petitioner seeks a reversal of his conviction or a sentence reduction.

Government's Response

(1) Grounds one through nine and fourteen and fifteen should have been raised on direct appeal and are procedurally defaulted.

(2) Grounds ten and eleven are without merit and should be denied because *Blakely* and *Booker* do not apply to this defendant.

(3) Ground twelve is not cognizable in a § 2255 proceeding, or alternately, is procedurally defaulted.

(4) Grounds thirteen and sixteen were raised on direct appeal and cannot be litigated in a § 2255 motion.

II. Analysis

A petitioner collaterally attacking his sentence or conviction bears the burden of

> proving that his sentence or conviction was imposed in violation of the Constitution or laws of the United States, that the court was without jurisdiction to impose such a sentence, that the sentence exceeded the maximum authorized by law, or that the sentence otherwise is subject to collateral attack. 28 U.S.C. § 2255. A motion collaterally attacking a petitioner's sentence brought pursuant to § 2255 requires the petitioner to establish his grounds by a preponderance of the evidence.

Sutton v. United States of America, 2006 WL 36859 *2 (E.D.Va Jan. 4, 2006).

A. Procedural Default

"[A] final judgment commands respect. For this reason, we have long and consistently affirmed that a collateral challenge may not do service for an appeal." *United States v. Frady*, 456 U.S. 152, 165 (1982). Therefore, the failure to raise a claim on direct appeal may result in a procedural default barring collateral review. *Housley v. United States*, 523 U.S. 614 (1998).

> In order to collaterally attack a conviction or sentence based upon errors that could have been but were not pursued on direct appeal, the movant must show cause and actual prejudice resulting from the errors of which he complains or he must demonstrate that a miscarriage of justice would result from the refusal of the court to entertain the collateral attack.

United States v. Mikalajunas, 186 F.3d 490, 492-493 (4th Cir. 1999). "The existence of cause for a procedural default must turn on something external to the defense, such as the novelty of the claim or a denial of effective assistance of counsel." *Id.* Actual prejudice is then shown by demonstrating that the error worked to petitioners' "actual and substantial disadvantage," rather than just creating a possibility of prejudice. *See Satcher v. Pruett*, 126 F.3d 561, 572 (4th Cir. 1997) (quoting *Murray v. Carrier*, 477 U.S. 478, 494 (1986)).

"In order to demonstrate that a miscarriage of justice would result from the refusal of the court to entertain the collateral attack, a movant must show actual innocence by clear and "convincing evidence." *Mikalajunas*, 186 F.3d at 493. "Typically, to establish actual innocence, a petitioner must demonstrate actual factual innocence of the offense of conviction, i.e., that petitioner did not commit the crime of which he was convicted; this standard is not satisfied by a showing that a petitioner is legally, but not factually, innocent." *Id.* at 494. The petitioner must show that "it is more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. 298 (1995).

Here, the respondent asserts that grounds one through nine and fourteen and fifteen should have been raised on direct appeal, and are now procedurally defaulted. In response, petitioner argues that many of these claims are based on newly discovered evidence that was not previously available, and therefore, could not be raised on direct appeal.

In this Circuit, the Court utilizes a five-part test to determine whether a new trial should be granted based on newly discovered evidence. In doing so, the Court must find that: (1) the evidence is in fact newly discovered, i.e., discovered since trial; (2) diligence on the part of the movant

may be inferred from the facts alleged; (3) the evidence relied on is not merely cumulative or impeaching; (4) the evidence relied on is material to the issues involved; and (5) the evidence relied on is of such a nature that on a new trial, the newly discovered evidence would probably produce an acquittal. *United States v. Fulcher,* 250 F.3d 244 (4th Cir. 2001) (*citing United States v. Custis*, 988 F.2d 1355, 1359 (4th Cir. 1989)). This test is also applied to evidence claimed to be newly discovered when put forth to support a claim of innocence or to show that a jury was subjected to improper influence. *Holmes v. United States*, 284 F.2d 716, 719 (4th Cir. 1960).

Ground One

In ground one, petitioner asserts various instances of prosecutorial misconduct during the grand jury proceedings and during trial. Petitioner admittedly did not raise these instances of misconduct on appeal because "all evidence and witnesses were not adequately known or located" at that time. Petition at 5. Upon a review of the record, these claims are either not newly discovered, or are without merit.

In this ground, petitioner asserts that the prosecutor solicited known perjury and/or colluded to destroy or conceal exonerating evidence about petitioners' military contracts, tax records, and whether or not the victims made final payments. However, petitioner would clearly have known at trial whether testimony about his military contracts, tax records, and whether the victims made final payments was true or false and the truth of these matters should have been challenged at trial.

Moreover, the evidence petitioner raises in supportofhis claims that the prosecutor suborned perjury with regard to these records was clearly available to

petitioner at the time of trial or on appeal. For example, in support of his claim that the prosecutor suborned perjury with regard to his military contracts, petitioner asserts that the prosecutor allowed petitioner to travel to the Middle East to service military drones during his criminal proceedings. Therefore, the prosecutor knew petitioner had military contracts and knowingly suborned perjury when she elicited testimony from a witness that suggested petitioner never had any military contracts. By petitioner's own evidence, the events leading to the alleged subordination of perjury occurred during trial and petitioner was aware of the facts in support of his claim at that time. Any information obtained after trial, i.e., the records of Pat Kelley, do not make the claim newly discovered. With or without the additional evidence, petitioner still could have raised the claim on direct appeal.[4]

With regard to petitioners' tax records, he states that "indications are that Wesley [the prosecutor] directed the IRS to search under a tax ID/number and or name different than that used pretrial in order to create a situation so that the IRS agent could state that no taxe (sic) filings were made." Petition at Ground One. Even assuming, arguendo, that this claim is newly discovered, the claim still fails as petitioner offers nothing but innuendo and supposition to support it.

Finally, with regard to his claim that the prosecutor suborned perjury when she elicited testimony from the victims that they made final payments, this instance is not

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[4]Additionally, I note a lack of diligence on the part of the petitioner to bring forth this material at an earlier date. Petitioner certainly should have known who held evidence of his military contracts and could have contacted those people before trial, during trial, or in preparing his appeal. Further, I find that the evidence is merely impeaching and that it was or is unlikely to change the outcome of the trial.

newly discovered. The basis for this ground occurred at trial and was clearly known to petitioner at the time his appeal was filed. Thus, this claim should have been raised on direct appeal and is now procedurally defaulted. As noted previously in this ground, the discovery of additional evidence does not change the fact that petitioner was aware of the basis for the claim at the time his appeal was pending and that the claim could have been raised at that time.[5] Moreover, although pertinent to the charges against petitioner, the evidence is merely impeaching.

Accordingly, petitioners' evidence with regard to ground one is either not newly discovered or without merit. Thus, ground one should be denied.

Ground Two

In ground two, petitioner asserts that the prosecutor and postal inspector concealed or destroyed exonerating documents and interviews. Specifically, petitioner asserts that the prosecutor and the postal inspector destroyed documents obtained from Pat Kelley; represented to the court that certain documents did not exist; and "lost" 18 interviews and certain documents taken from those interviewees that were helpful to petitioners' defense.

With regard to Pat Kelley's documents, this claim is

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[5]In addition, even if this instance of misconduct could be considered "newly discovered," petitioners' contention is without merit because he has failed to show that the prosecutor suborned perjury by asking these questions. To the contrary, petitioner is merely arguing semantics. Petitioner states that the payments were "progress payments," rather than "final payments," and that the prosecutor knew this. Thus, the prosecutor suborned perjury by asking the victims if they made final payments. However, this shows, at best, that the prosecutor mis-spoke or that there was some dispute as to the purpose of the payments.

not newly discovered, and even if it is, does not entitle petitioner to relief. Petitioner conducted business with Mr. Kelley and presumably would have known that Mr. Kelley held documents that showed petitioner was engaged in military contracts. Petitioner need only have contacted Mr. Kelley and asked him to testify on his behalf. Even assuming that the prosecutor and postal inspector failed to return some of Mr. Kelley's business records, Mr. Kelley could still have testified at petitioners' trial.[6] Upon questioning, petitioner would have discovered that Mr. Kelley's records had allegedly not been returned.

Moreover, finding out after trial that the prosecutor and postal inspector allegedly failed to return some of Mr. Kelley's business records is inapposite. As evidenced by petitioner's voluminous filings, petitioner could have produced several documents, dating as far back as 1989, to show the existence of military contracts. *See* Amended § 2255 Motion at Exhibits to Ground One. Therefore, Mr. Kelley's documents were not essential to petitioners' defense, and even if the prosecutor did engage in the alleged misconduct, petitioner is not entitled to relief.

With regard to the documents that the prosecutor alleged did not exist, then later turned over during discovery, this claim is not newly discovered. By his own facts, the basis for this claim occurred during petitioners' criminal

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[6]Prosecutor Wesley and Postal Inspector Randolph took possession of certain business records provided by Mr. Kelley pursuant to a subpoena. Mr. Kelly provided Wesley and Randolph with his original records without retaining copies for himself. Wesley and Randolph did not index or document in any way, the exact records provided by Mr. Kelley. Mr. Kelley now claims that some of his records are missing. However, Wesley and Randolph contend that all of Mr. Kelley's records were returned to him. Mr. Kelley concedes that Wesley and Randolph returned some of his records, but not all.

proceedings. Therefore, the claim was known to petitioner at trial and was available at the time of appeal. With or without any additional evidence discovered after trial, petitioner still could have raised the claim on direct appeal and the claim is now procedurally barred.

Finally, even assuming that petitioner's claim with regard to the 18 missing interviews is newly discovered, this claim should be denied as insufficiently pled. Although petitioner names the 18 people who were allegedly interviewed, petitioner provides no affidavits or other evidence to support his claim. Additionally, petitioner does not assert what information was obtained from those persons or how either the interviews or documentation exonerates him.

Accordingly, petitioners' evidence with regard to ground two is either not newly discovered or without merit. Thus, ground two should be denied.

Ground Three

In ground three, petitioner asserts 16 instances of prosecutorial misconduct. Petitioner admits the second instance was raised on appeal, but that the other 15 instances were not. Petitioner asserts that this court should entertain the second instance because the Court of Appeals did not specifically address it in affirming his conviction. However, petitioner provides no explanation for the failure to raise the other 15 grounds on appeal.

Because petitioner fails to allege cause and prejudice for his failure to raise 15 of the alleged instances on direct appeal, those instances are procedurally defaulted. Additionally, because petitioner does not assert that a fundamental miscarriage of justice will occur if this court

does not address those claims under § 2255, those claims should be denied.

As to the second instance, that claim was raised on direct appeal. *See United States v. Zehrbach, supra.* On appeal, petitioner argued that the district judge erred by denying his motion for a new trial. That motion was based on the prosecutor's remarks during rebuttal that she never found any "checks" substantiating the defendants claims of payment. Defense counsel objected and the district judge admonished the AUSA not to testify and gave a ctirative instruction. The district judge denied a defense motion for a new trial based on those comments, however, in doing so, the district judge recognized that the mistake was "egregious and extremely unfortunate," but that the curative instruction and admonishment were sufficient.

In denying this ground, the Court of Appeals found that the prosecutor's remarks were improper, but that the defendant could not establish that any prejudice resulted from the remarks. Therefore, even though petitioner now raises the ground as one of prosecutorial misconduct, the result is the same. The prosecutor's remarks were improper, as noted by both the district judge and the Court of Appeals. However, both the district judge and the Court of Appeals found that the remarks did not prejudice the defense. Thus, even if the comments rise to the level of prosecutorial misconduct, petitioner is entitled to no relief.

Accordingly, petitioners' evidence in support of ground three is not newly discovered or does not establish that petitioner is entitled to relief and ground three should be denied.

Grounds Four - Seven and Fourteen

In grounds four through seven and fourteen, petitioner concedes that these issues were not raised on direct appeal. Moreover, petitioner offers no reason for not raising them on direct appeal, other than his assertion that he planned to raise all the instances of misconduct "en mass" in a § 2255 motion. Therefore, grounds four through seven and fourteen are procedurally defaulted. Because petitioner has failed to show cause'and prejudice.for his default, or that a miscarriage of justice wiU occur if the court fails to consider these claims under § 2255, these grounds should be dismissed.

Ground Eight

In ground eight, petitioner asserts that post-trial newly discovered evidence shows that witnesses peljured themselves, proving that he was fraudulently convicted. In support of his claim, petitioner asserts that witnesses have come forward post-trial alleging that the "victims" have been bragging that they framed petitioner and put him out of business, that certain FAA documents on petitioners' products are now available, and that the victims have put petitioners' goods on display since his conviction.

The FAA documentation provided by petitioner suggests that certain engines built by his company were tested and found to be operational. This information appears to contradict the testimony of five of the victims. However, according to petitioners' statements, these engines were built prior to his criminal trial. Therefore, petitioner could have had these engines tested prior to trial and used that information to contradict the testimony of the government's witnesses at that time. Waiting until 2005 to test engines that could have helped his defense shows a complete lack of diligence. Moreover, the evidence does not prove that the witnesses perjured themselves. The evidence is merely

impeaching. Accordingly, this claim is either not newly discovered or without merit and should be denied.

Petitioner asserts that Terry Morris was threatened with arrest to prevent him from testifying as to how well the petitioner's engines really worked. However, this argument is insufficiently pled and/or lacks merit. With regard to tills claim, petitioner provides no affidavits, declarations, or other evidence to support his claim. Moreover, petitioner admits that despite similar threats, Mr. Morris testified favorably at petitioners' grand jury hearing. The failure to call Morris as a defense witness at trial was not the fault of the prosecution. Petitioner merely had to subpoena Mr. Morris to testify. There is no evidence in petitioners' criminal case record to show or even suggest that Mr. Morris failed to appear.

With regard to petitioners' claim that the victims have since bragged about framing him, this claim is insufficiently pled. Petitioner provides no affidavits, declarations, or other evidence to support his claim. Therefore, petitioner has failed to show by a preponderance of the evidence that he is entitled to relief and this claim should be dismissed.

With regard to his claim that government witness Dick McCoon committed perjury and/or concealed evidence, petitioner asserts that he discovered in March of 2005 that this government witness is a business partner offive of the victims and had a financial motive to commit pezjury. However, even assuming that the evidence to support this claim is "newly discovered,"[7] this claim is without merit. Simply because Mr. McCoon had an interest in a competing company does not prove that Mr. McCoon committed

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[7]Interestingly, the petitioner argues that the prosecution either knew this or should known this at trial. It foHows then, that a diligent defendant should have discovered this information at trial too.

perjury, it merely calls into question his motives for testifying. Accordingly, this claim should be denied.

Finally, in support of ground eight, petitioner asserts that victim Fagerstrom did receive an engine and concealed this fact from the jury. Petitioner asserts that he now has pictures proving that Fagerstrom lied on the witness stand. Petitioner asserts that the pictures show one of his engines fitted into Fagerstrom's express aircraft. However, the pictures submitted by petitioner are not authenticated, not dated, and fail to show by a preponderance of the evidence that Fagerstrom perjured himself at trial. Accordingly, this claim should be denied.

Petitioners' claims in support of ground eight are not newly discovered, are without merit, or fail to show that he is entitled to relief. Therefore, ground eight should be denied.

Ground Nine

In ground nine, petitioner asserts that he was convicted of the non delivery of products which the victims themselves stole from him. In support of this claim, petitioner alleges that the district judge erred in excluding several pieces of evidence from the jury that showed that the "victims" stole petitioners' products and that they had motive for framing petitioner for this crime. Based on these allegations, I find that this ground is really a challenge to the evidentiary findings of the district judge.

However, on direct appeal, petitioner made a general argument that the district judge's evidentiary rulings were an abuse of discretion that in cumulation, violated his right to a fair trial. In addressing this issue, the Court of Appeals found that even if petitioner could make a "combined effect"

argument, petitioner had failed to show that his right to a fair trial was violated by the district judge's evidentiary rulings. In fact, the Court of Appeals specifically stated that it had reviewed each of the defendants' objections to the district judge's evidentiary rulings and that none alone justified reversal. Thus, the "cumulative effect" of the court's evidentiary rulings could not be prejudicial.

It is quite clear from the record of petitioners' appeal proceedings that the essence of ground nine was known by petitioner at the time his direct appeal was filed. In fact, the essence of ground nine has already been decided by the Court of Appeals. Because any "newly discovered evidence" is merely incidental, and because the Court of Appeals has already determined that the basis for ground nine is without merit, ground nine should be denied.

Ground Fifteen

In this ground, petitioner asserts that he was indicted, tried, and convicted as a result of payoffs to DOJ employees. Assuming, arguendo, that this claim is newly discovered, the claim still fails as petitioner offers nothing but innuendo and supposition to support this claim.

B. Blakely/Booker Areuments

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In June of 2004, the Supreme Court applied this ruling to the State of Washington's sentencing scheme and found that the imposition of state sentencing enhancements – based solely on factual findings by the court – violated a defendant's

Sixth Amendment rights because the facts supporting the findings were neither admitted by the defendant nor found by a jury. *See Blakely v. Washington*, 542 U.S. 296, 301-303 (2004). In addition, the Court expressly noted that it was not considering the constitutionality of the federal sentencing guidelines. *Id.* at 305, n 9. Subsequently, however, the Supreme Court took up this issue in *United States v. Booker*, 543 U.S. 220 (2005).

In *Booker*, the Supreme Court held that *Blakely* applies to the federal sentencing guidelines, and therefore, the Sixth Amendment is violated when a district court imposes a mandatory sentence under the Guidelines that is greater than the maximum authorized by the facts found by the jury alone. *Booker*, 543 U.S. at 243. Additionally, the Court held that two provisions of the statute creating the guidelines system must be excised to make them compatible with the Sixth Amendment, thereby rendering the guidelines advisory. *Id.* at 258-261.

In ground ten, petitioner asserts that pursuant to *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi v. New Jersey*, *supra*, *Ring v. Arizona*, 536 U.S. 584 (2002), and *Harris v. United States*, 536 U.S. 545 (2002), his sentence was unconstitutionally enhanced when the sentencing judge determined the amount of the fraud, the number of persons defrauded, and whether or not an obstruction of justice charge was justified. However, this claim was available to petitioner at the time of sentencing and on direct appeal.[8] Because petitioner failed to raise this claim at the appropriate time, this claim is procedurally

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[8]Petitioner was sentenced on October 18, 2002, and his direct appeal was pending from October 25, 2002, to May 11, 2004. The Supreme Court issued its decision in *Jones* in 1999, its decision in Apprendi in *2000*, and its decisions in *Ring* and *Harris* in June of 2002.

defaulted and cannot be raised for the first time in a § 2255 motion.

Additionally, in grounds ten and eleven, petitioner argues that *Booker*, as an extension of the Supreme Court's prior cases, entitles him to relief iTom an unconstitutionally enhanced sentence. However, this claim is foreclosed by the Fourth Circuit's decision in *United States v. Morris*, 429 F.3d 65 (4th Cir. 2005). In *Morris*, the Fourth Circuit found that *Booker* has not been made retroactively applicable to cases on collateral review. *Morris* at 72. Thus, *Booker* is inapplicable to cases that became final prior to the issuance ofthe Supreme Court's decision in those cases. *Id.*

Here, petitioners' conviction was affirmed on appeal on May 11, 2004. There is no evidence to suggest that petitioner filed a petition for writ of certiorari with the United States Supreme Court so his conviction and sentence became final when the time for doing so - 90 days - had elapsed. Thus, petitioners' sentence became final on August 9, 2004. *Booker* was decided on January 12, 2005. Accordingly, *Booker* is not available to petitioner on collateral review.

C. Sentencing Issues

In ground twelve, petitioner asserts that he was given an enhancement for obstruction of justice. Petitioner asserts that this enhancement was the result of a finding by the district judge that some of the victims did not get certain documents in the mail. The prosecutor alleged that because the documents were not received, they must not have been sent and/or that they were fabricated. However, other than the prosecutor's unsupported assertion, no evidence was presented to sustain this charge. Therefore, petitioner alleges that this enhancement was not proved beyond a reasonable

doubt and should not have been considered at sentencing.

A review of the file in this case shows that this ground was not raised on direct review. Petitioner does not allege cause and prejudice for his default or that a miscarriage of justice will result if the court refuses to entertain this claim on collateral review. *See Mikalajunas*,186 F.3d at 492-493. As previously noted, to demonstrate that a miscarriage of justice will occur, tbe defendant must show by clear and convincing evidence tbat he is actually innocent. *Id.* at 493. "'Actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 532 U.S. at 623.

Because petitioner fails to make the requisite showing, ground twelve is procedurally defaulted and cannot be raised for the first time in a § 2255 motion.

D. Issues Raised on Direct Appeal

Grounds thirteen and sixteen were raised on direct appeal. Petitioners' conviction and sentence were affirmed. Because a federal court is not required to second-guess itself, a claim decided on direct review cannot ordinarily be relitigated in a § 2255 proceeding unless the petitioner can show an intervening change in the law. *Davis v. United States*, 417 U.S. 333 (1974); *Boeckenhaupt v. United States*, 537 F. 2d 1182 (4th Cir. 1976).

In ground thirteen, petitioner asserts that the United States Probation Office failed to properly verify or confirm the victims claims for monetary damages. Ground sixteen amounts to a claim that there was insufficient evidence to convict him of certain aspects of Count one and of Count two. Petitioner asserts no intervening change in the law that would require the Court to reconsider these issues under §

2255. Therefore, grounds thirteen and sixteen should be denied.

III. Conclusion

For the reasons set forth in this opinion, the undersigned recommends that the Court enter an Order DENYING petitioner's § 2255 motion and DISMISSING the case with prejudice. In light ofthis recommendation, the undersigned also recommends that the Court deny petitioner's:

- Motion for Judgment on Pleadings (Doc. 225)
- Motion for Summary Judgment (Doc. 226)
- Second Motion for Judgment of Pleadings (Doc. 228)
- Second Motion for Partial Summary Judgment (Doc. 230)
- Third Motion for Judgment on Pleadings (Doc. 235)
- Motion for Partial Summary Judgment (Doc. 238)
- Motion for Correction of Illegal Sentence (Doc. 239)[9]

Any party may file within ten (10) days after being

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[9]This motion is merely a reiteration of the claims raised in petitioner's §2255 motion and should be denied for the same reasons stated in this opinion.

served with a copy of this Recommendation with the Clerk of the Court written objections identifying the portions of the Recommendation to which objections are made, and the basis for such objections. A copy of such objections should also be submitted to the Honorable W. Craig Broadwater, United States District Judge. Failure to timely file objections to the Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Recommendation.[10]

The Clerk is directed to provide a copy of this Report and Recommendation to the *pro se* petitioner and any counsel of record.

DATED: March 23, 2006

/s/
MAGISTRATE JUDGE

[10]28 U.S.C. § 636(b)(1); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984), *cert. denied*, 467 U.S. 1208 (1984); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *Thomas v. Arn*, 474 U.S. 140 (1985).

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

DARUS ZEHRBACH,
Petitioner,

v.

Civil no. 1:05-cv-79
Crim no. 1:00-cr-33
(Judge Broadwater)

UNITED STATES OF AMERICA,
Respondent.

ORDER ON PENDING MOTIONS

On May 11, 2005, the *pro se* petitioner, Darus Zehrbach, filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. On May 17, 2005, the undersigned determined that summary dismissal of the petition was not warranted and the respondent was directed to file an answer.

On May 26, 2005, petitioner filed a motion to amend his § 2255 motion. That motion was granted on May 31, 2005, and the petitioner's amended § 2255 motion was filed that same day. Accordingly, the respondent was given an additional thirty (30) days from the date of that Order to file its response to the amended motion. The respondent timely filed a response on June 13, 2005.

Consequently, this case was referred to the undersigned by Order entered on August 2, 2005. Petitioner filed a Reply to the Respondent's Response on September 16, 2005.[1]

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[1]Although the response includes a Certificate of Service stating that a copy was sent to petitioner on June 13, 2005, petitioner asserts that he never received such a copy. Petitioner also asserts that he was not aware that

I. Petitioners' Pending Motions

The following motions are currently pending before the Court:

(1) Motion for Discovery (Doc. 206);

(2) Motion for Access to Stored Documents (Doc. 207);

(3) Request for Documents Believed to be in the Court's Control (Doc. 209);

(4) Request for Documents Believed to be in the Court's Control (Doc. 210);

(5) Motion to Compel or Enter Default Judgment (Doc. 213);

(6) Motion for Order to Show Cause (Doc. 214);

(7) Motion for Certification of Civil Contempt (Doc. 217);

(8) Motion for Expedited Consideration (Doc. 219);

(9) First Motion to Supplement or Expand the Record (Doc. 221);

(10) Motion for Judgment on the Pleadings (Doc. 225);

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a response had been filed until August 31, 2005, when he received a copy of his docket sheet, and a copy of the response, from the Clerk of Court. Upon this discovery, petitioner promptly filed a reply to the response.

(11) Motion for Summary Judgment (Doc. 226);

(12) Second Motion for Judgment on the Pleadings (Doc. 228);

(13) Second Motion for Partial Summary Judgment (Doc. 230);

(14) Motion for Extension of Time to Comply with Deficiency Notice (Doc. 231);

(15) Motion for an Order of Mandamus on an Expedited Consideration Basis (Doc. 232);

(16) Motion to Withdraw Two Motions and Motion to Seek Sanctions (Doc. 234);

(17) Third Motion for Judgment on the Pleadings (Doc. 235);

(18) Second Motion to Expand the Record (Doc. 236);

(19) Motion for Partial Summary Judgment (Doc. 238); and,

(20) Motion to Amend/Correct Illegal Sentence (Doc. 239).

II. Analysis

1. Motion for Discovery

Pursuant to Rule 6 of the Rules Governing Section 2255 Proceedings, "[a] party may invoke the processes of discovery. . . [only] to the extent that, the judge in the

exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. . . . Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced."

Here, petitioner fails to comply with the requirements of Rule 6. Petitioner did not accompany his requests with a list of the discovery sought to be produced, nor has he shown good cause for his request. Accordingly, petitioners' Motion for Discovery (Doc. 206) is DENIED.

2. Motion for Access to Stored Documents

In this motion, petitioner seeks an Order from the Court granting him a seven (7) day furlough so he may access certain records that are in storage. Petitioner claims that he needs these records to support his § 2255 motion and that there is no one available to obtain these records on his behalf. Therefore, he requests the Court order the Bureau of Prisons to release him on furlough so he may access the mentioned records.

The authority to grant a furlough to a prisoner is vested in the AttorneyGeneral of the United States. *See* 18 U.S.C. § 4082. The Attorney General has delegated this duty to the Director of the Bureau of Prisons. *See* 28 C.F.R. § 0.96. Pursuant to Program Statement 5280.08, the Bureau of Prisons has determined that "[t]he furlough program. . . is intended to help the inmate to attain correctional goals. A furlough is not a right but a privilege granted an inmate under prescribed conditions. It is not a reward for good behavior, nor a means to shorten a criminal sentence."

Accordingly, this Court does not have the authority to grant petitioner the relief he seeks. Moreover, even if it

did, petitioner has failed to establish that he qualifies for release on furlough. *See* 18 U.S.C. § 3622 (setting forth the criteria for release on furlough). Thus, petitioners' Motion for Access to Stored Documents (Doc. 207) is DENIED.

3. Request for Documents Believed to be in the Court's Control

In this motion, petitioner seeks transcripts of a meeting that took place in connection with his grand jury proceedings. This meeting is apparently related to a complaint filed with the Clerk of Court by Patrick Kelly. In the complaint, Mr. Kelly complained of the way he was treated by the government during petitioners' grand jury proceedings. Mr. Kelly was evidently called as a grand jury witness, although he never testified. See Doc. 74. He did, however, provide the government with certain business records that had been subpoenaed. *Id.* Petitioner also requests a list of people who met with the Clerk for the grand jury proceedings.

Upon a review of the record in petitioners' criminal case, the Court is unable to ascertain exactly what records petitioner seeks and whether any such documents exist. Accordingly, the petitioner's Request for Documents (Doc. 209) is DENIED without prejudice as vague.

4. Request for Documents Believed to be in the Court's Control

This document (Doc. 210) is identical to the one discussed under Heading 3 and is DENIED without prejudice for the same reasons.

5. Motion to Compel or Enter Default Judgment

In this motion, the petitioner asserts that the respondent failed to timely file a response to his § 2255 motion and the Court's Order of May 17,2005. Therefore, the petitioner seeks an Order compelling the respondent to file an answer or entering a default judgment against the respondent.

On January 20, 2006, petitioner filed a motion to withdraw his Motion to Compel and his Motion for Order to Show Cause. Accordingly, the Court will GRANT petitioners' Motion to Withdraw (Doc. 234) and the CLERK is directed to TERMINATE petitioners' Motion to Compel (Doc. 213) and Motion for Order to Show Cause (Doc. 214).

6. Motion for Order to Show Cause

This motion was tenninated under Heading 5.

7. Motion for Certification of Civil Contempt

In this motion, petitioner asserts that the respondent has failed to properly respond to his § 2255 motion as directed by the Court in its Order of May 17,2005. Therefore, the petitioner asserts that the Assistant United States Attorney ["AUSA Wesley"] assigned to this case is in contempt for the willful disregard of an Order of the Court. Thus, petitioner requests the Magistrate Judge certify the acts which constitute the contempt to the District Judge and issue an Order requiring AUSA Wesley to appear before the District Judge for contempt proceedings.

A United States Magistrate Judge has the jurisdiction to exercise contempt authority. See 28 U.S.C. § 636. In doing so, the Magistrate Judge shall certify the acts which constitute the civil contempt to a District Judge and issue an order requiring the person in contempt to appear before the

District Judge. § 636(e)(6). The District Judge shall hear the evidence and detennine if punishment is warranted and punish such person accordingly. *Id.*

Here, the undersigned directed the respondent to file a response to the petitioner's § 2255 motion in accordance with the Rules Governing Section 2255 Proceedings. The respondent filed a timely response on June 13,2005. In that response, AUSA Wesley asserts that the petitioner's claims are procedurally barred, are without merit, and/or are not cognizable on § 2255 review. Moreover, AUSA Wesley asserts that petitioner is not entitled to an evidentiary hearing.

Upon a review of the response, the Court finds no basis for contempt proceedings. Although the response by AUSA Wesley was cursory at best, she did in fact address eachof petitioners' claims and state the reasons for which petitioner is not entitled to relief. Because AUSA Wesley substantially complied with the Order of May 17,2005, petitioner's Motion for Certification of Civil Contempt (Doc. 217) is DENIED.

8. Motion for Expedited Consideration

In this motion, the petitioner alleges that the respondent willfully failed to timely file a response to his § 2255 motion and various other motions filed since the initiation of this case. Accordingly, petitioner asserts that justice requires that his case be resolved without delay.

However, as already noted several times throughout this Order, the respondent has timely filed a response to petitioners' § 2255 motion. Therefore, the basis of the instant motion is factually inaccurate. Thus, to the extent that petitioner argues that justice requires that his motion be

given expedited review, that part of the motion (Doc. 219) is DENIED. However, contemporaneous with this Order, the Court is issuing a report and recommendation on the merits of petitioners' claims and the arguments raised by the respondent. Therefore, to the extent the petitioner merely seeks a decision on the merits of his claims, that part of the motion is GRANTED.

9. First Motion to Supplement or Expand the Record

Pursuant to Rule 7 of the Rules Governing Section 2255 Proceedings the judge may direct that the record be expanded if the § 2255 motion is not summarily dismissed. In doing so, the judge may allow the inclusion of additional materials relevant to the merits of the motion, which include, but are not limited to, letters, documents, exhibits and answers under oath to written interrogatories propounded by the judge. However, copies of such letters, documents, exhibits and affidavits must be submitted to the opposing party so he or she has the opportunity to admit or deny their correctness.

Here, petitioner submits affidavits in support of the claims raised in his § 2255 motion. By the Certificate of Service, it appears that petitioner submitted these affidavits to opposing counsel. Accordingly, petitioners' First Motion to Supplement or Expand the Record (Doc. 221) is GRANTED. The affidavits shall remain as filed and will be considered by the Court.

10. Motion for Judgment on the Pleadings

This motion will be addressed in the Report and Recommendation filed contemporaneously with this Order.

11. Motion for Summary Judgment

This motion will be addressed in the Report and Recommendation filed contemporaneously with this Order.

12. Second Motion for Judgment on the Pleadings

This motion will be addressed in the Report and Recommendation filed contemporaneously with this Order.

13. Second Motion for Partial Summary Judgment

This motion will be addressed in the Report and Recommendation filed contemporaneously with this Order.

14. Motion for Extension of Time to Comply with the Court's Deficiency Notice

On November 24, 2005, petitioner executed a Motion for an Order of Mandamus on an Expedited Consideration Basis for the Fourth Circuit Court of Appeals. Petitioners' motion was received by the Court of Appeals as evidenced by a deficiency notice sent to petitioner on December 9, 2005. In that Notice, the petitioner was informed that his mandamus petition did not comply with Rule 21 of the Appellate Rules of Civil Procedure because he failed to provide proof of service on the trial court and failed to provide parts of the record essential to understanding the petition. The Court of Appeals informed petitioner that if he did not correct the deficiency within seven (7) calendar days, it would start dismissal proceedings. Acopy of the deficiency notice was received by this Court from the Court of Appeals on December 14, 2005.

On December 19, 2005, the Court received a copy of a Motion for Extension of Time for petitioner to comply with the Deficiency Order of the Fourth Circuit. Although that motion was styled for the Fourth Circuit Court of Appeals

and did not pertain to these proceedings, the motion was docketed in this case. Also included with that motion was a copy of petitioners' Motion for Mandamus which was docketed separately.

Because petitioners' motion for an extension of time pertained to a deficiency notice issued by the Fourth Circuit Court of Appeals, that motion should have been filed with the Fourth Circuit. Accordingly, the motion (Doc. 231) is STRICKEN from the record, but a copy shall remain on file. In addition, the Clerk is directed to forward the original motion to the Fourth Circuit Court of Appeals for resolution in that Court.

15. Motion for an Order of Mandamus on an Expedited Consideration Basis

Based on the procedural information contained under Heading 14, I believe that the motion for mandamus, received simultaneously with the motion for an extension of time to comply with the Fourth Circuit's deficiency notice, was merely petitioners' attempt to comply with the deficiency notice of the Fourth Circuit. Accordingly, the motion for mandamus (Doc. 232) is also STRICKEN from the record, although a copy shall remain on file.

16. Motion to Withdraw Two Motions and Seek Sanctions

Petitioners' motion to withdraw was granted under heading 5 of this Order.

With respect to the motion for sanctions, petitioner seeks sanctions against AUSA Wesley for failing to serve a copy of her response on petitioner. Pursuant to Rule 11 (c)(1)(A) of the Federal Rules of Civil Procedure, "[a] motion for sanctions under this rule shall be made separately

from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, . . . the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. "

In this case, petitioner failed to comply with the requirements of Rule 11. Petitioner did not file his motion for sanctions separate from other motions, nor did he allow the respondent time to correct the challenged conduct prior to filing his request. Accordingly, the Motion for Sanctions (Doc. 234) is DENIED.

17. Third Motion for Judgment on the Pleadings

This motion will be addressed in the Report and Recommendation filed contemporaneously with this Order.

18. Second Motion to Expand the Record

In this motion, petitioner again seeks permission to supplement or expand the record to include affidavits, documents, and evidence in support of the claims made in his § 2255 motion.

Upon due consideration of the motion, and pursuant to Rule 7 of the Rules Governing Section 2255 Proceedings,[2] the petitioner's Second Motion to Expand the Record (Doc. 236) is GRANTED. The affidavits and other documents attached to the motion shall remain as filed and will be considered by the Court.

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[2] *See* Heading 9, *infra*.

19. Motion for Partial Summary Judgement

This motion will be addressed in the Report and Recommendation filed contemporaneously with this Order.

20. Motion to Amend/Correct Illegal Sentence

This motion will be addressed in the Report and Recommendation filed contemporaneously with this Order.

III. Conclusion

As set forth in this Order, the Clerk is directed to grant, deny, moot, strike, or otherwise terminate the petitioner's pending motions. Additionally, the Clerk is directed to provide a copy of this Order to the pro se petitioner and any counsel of record.

IT IS SO ORDERED.

DATED: March 23,2006

/s/
JOHN S. KAULL
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

DARUSZEHRBACH
Petitioner

Civil Action no 1:05CV79
v. Criminal Action no 1:00CR33

UNITED STATES OF AMERICA
Respondent

PETITIONER ZEHRBACH's
MOTION FOR JUDGMENT ON THE PLEADINGS

NOW COMES, Petitioner Zehrbach, filing Pro Se, and moves this Court for an Order as follows:

I.

Four months have elapsed since the filing of a Response by the Government to Petitioner's 28 at 2255 Motion without a ruling by this Court.

This Court found the 28 at 2255 Motion and Movant's assertions to be meritorious enough to Order the US Attorney to Answer the 2255 Motion.

Petitioner filed a "Motion In Regard to the United States Response arguing that the Government's "Response" was not an Answer as required under Rule 5 of Section 28 at 2255. As the Government refused to factually "respond to the allegations ofthe motion".

Petitioner also pointed out in this Motion that the Government did not deny assertions of misconduct made in

Grounds Fourteen and Fifteen of Petitioners 28 at 2255 Motion.

The Government has not objected to or opposed Petitioner's Motion.

Petitioner therefore seeks a Ruling and Order on his Motion Objecting to the Government's Response without further delay.

II.

If this Court having considered Petitioner's Motion in regard To the Government's Response finds that the Government's Response qualifies as a proper answer under Rule 5, then this Court must believe that sufficient disputed issues exist to require and evidentiary hearing.

Petitioner has filed a Motion to Expand the Record under Rule 7 of a 2255. The Exhibits to this Motion, primarily sworn affidavits, should clearly assist the Court to establish the truth of the matter.

Petitioner's Motion to Expand the Record was filed on 8/25/05 and has not been ruled on. The Government has not objected to or opposed the Motions. Forty-Five days have elapsed since service upon the Government.

Petitioner therefore seeks a Ruling and Order on his Motion to Expand the Record.

III.

Petitioner filed a Motion for Discovery on 6/8/05. The Government has not objected to or opposed the Motion. Over four months have elapsed without opposition or a

ruling.

If this Court believes that Petitioner has provided insufficient evidence, despite the exhibits to his at 2255 Motion and as contained in the Motion to Expand the Record, then Petitioner is entitled to an evidentiary hearing. Discovery will enable Petitioner to document further his grounds.

Petitioner therefore seeks a Ruling and Order on his Motion for Discovery.

IV.

Petitioner believes that he has adequately proven or established his right to relief and that he has made an extraordinary effort to provide affidavits and exhibits to insure that this Court would have a well-supported Ground to consider. Petitioner further acted to aid this Court and to guarantee a clear view of the facts by filing the Motion to Expand the Record as noted above.

Given that the Government has failed or refused to oppose any of the three motions and or failed to Answer the 28 at 2255 motion in a factual manner as required, it should certainly be a reasonable request after four months of no movement on this case to Request an immediate ruling on the three motions.

WHEREFORE, Petitioner prays that this Honorable Court will rule upon and issue an Order Granting the relief sought in the three pending Motions by Petitioner of:

A) Motion to Expand the Record.
B) Motion in Regard to the United States' Response to Petitioner's 28 at 2255 Motion.
C) Motion for Discovery.

without further delay.

Respectfully submitted,

Date signed 10/13/05

Darus Zehrbach
Petitioner Pro Se
Prisoner 06809-067
Federal Prison Camp
PO Box 1000
Loretto, Pa., 15940

Date placed in prison
mailbox 10/13/05

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

DARUSZEHRBACH
Petitioner

Civil Action no 1:05CV79
v. Criminal Action no 1:00CR33

UNITED STATES OF AMERICA
Respondent

PETITIONER's
Second Motion
For Judgment on the Pleadings

NOW COMES, Petitioner Zehrbach, filing Pro Se, and moves this Court for an Order as follows:

Petitioner filed a Motion in regard to the United States' response to Petitioner's 28 at 2255 Motion. In that Motion, Petitioner complained that the government's response was insufficient and did not comply with Rule 5 of section 28 at 2255.

Petitioner further states that said response did not deny facts asserted in grounds fourteen and fifteen of the 28 at 2255.

Petitioner further stated that the response was inadequate as prosecutor Wesley failed or refused to comply with rule 8(b) which states that "denials shall fairly meet the substance of the averments denied". Ms. Wesley's mere statement that the "allegations are simply absurd" does not comply with the law.

The government did not specifically deny the facts in grounds fourteen and fifteen its response as required in rule 8(b), such that pursuant to rule 8(d) "averments in a pleading to which a responsive pleading is required - are admitted when not denied in the responsive pleading".

II.

On or about October 17, Petitioner filed a Motion for Partial Summary Judgment. The government refused to answer this motion as required under the rules of procedure. Pursuant to rule 8(d), effect of failure to deny, averments are admitted when not denied.

WHEREFORE, Petitioner prays that this Court will issue an order granting Petitioner's Motions as follows:

1) Grant Petitioner's Motion for Partial Summary Judgment and deem all facts asserted as well pled, true, and accurate.

Petitioner's Motion in regard to the United States response

2) Grant to Petitioner's 28 at 2255 Motion striking the unresponsive answer sections and ordering that the sections not denied be deemed as admitted along with other relief requested in the motion.

Respectfully submitted

Darus Zehrbach
Petitioner Pro Se
06809-067
Federal Prison Camp
PO Box 1000
Loretto, Pa. 15940

Date signed 11/23/05
Date placed in prison
mailbox 11/23/05

DARUSZEHRBACH
Petitioner

Civil Action no 1:05CV79
v. Criminal Action no 1:00CR33

UNITED STATES OF AMERICA
Respondent

PETITIONER'S
THIRD MOTION
FOR JUDGMENT ON THE PLEADINGS

NOW COMES, Petitioner, filing Pro Se, and moves this Court for an Order as follows:

On or about 12/13/05 Petitioner filed a Second Motion for Partial Summary Judgment.

In excess of 35 days have elapsed since the government was seved and or the Motion was filed.

The government has refused and or failed to file an Answer or to otherwise respond to the Motion.

Pursuant to the Rules of Civil Procedure and or Rule 8(d) and other applicable rules:

A) The averments made in Petitioners motion are to be deemed true and accurate and well pled given the government's refusal to respond to or deny the statements.

B) A Defaul Judgment and or Order granting Petiioner's Motion is in order.

A 28 at 2255 Motion is a civil procedure and this case bears

a civil action number such that the rules of civil procedure apply. The Order granting Petitioner's Motion is the proper action for this Court to take.

WHEREFORE, Petitioner Prays that this Court will issue an Order Granting petitioner's Second Motion for Partial Summary Judgment.

Respectfully Submitted,

Darus Zehrbach
Petitioner Pro Se
Prisoner 06809-067
Federal Prison Camp
PO Box 1000
Loretto, Pa., 15940

Date signed 1/17/06
Date placed in prison mail 1/17/06